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In the
Supreme Court of the United States

OCTOBER TERM, 1968

No. 856

EXCHANGE NATIONAL BANK OF CHICAGO, a national banking association

Petitioner

vs.

HOMER A. BONHIVER, as Receiver of American Allied Insurance Company, and SIDNEY P. ABRAMSON

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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vs.

HOMER A. BONHIVER, as Receiver of American Allied Insurance Company, and SIDNEY P. ABRAMSON

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioner, Exchange National Bank of Chicago, a national banking association, prays that a writ of certiorari issue to review the order dismissing appeal, entered in this cause by the United States Court of Appeals for the Eighth Circuit on October 14, 1968.

CITATIONS TO OPINIONS BELOW

The order dismissing appeal dated October 14, 1968, was entered without opinion. An opinion delivered earlier in this cause by the United States District Court for the District of Minnesota, Third Division, dated February 3, 1968, under the caption *Exchange National Bank of Chicago* v. *Abramson*, printed in Appendix C hereto, *infra* pp. C-1 - C-8, is reported in 278 F.Supp. 849 (1968). An opinion delivered by the same District Court on April 11,

1968, in a companion case, *Allied Realty of St. Paul* v. *Exchange National Bank of Chicago,* printed in Appendix D hereto, *infra* pp. D-1 - D-16, is reported in 283 F.Supp. 464 (1968).

Memorandum opinions in this cause by the District Court were delivered on August 20, 1968 and September 24, 1968, and are printed in Appendix C hereto, *infra* pp. C-8 - C-28 and C-28 - C-32, respectively. The August 20, 1968, opinion is reported in 45 F.R.D. 97 (1968), but thus far the September 24, 1968, opinion is unreported.

JURISDICTION

The order of the Court of Appeals dismissing petitioner's appeal was dated and entered on October 14, 1968. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1).

QUESTION PRESENTED

Whether a district court order which overrules a plea of venue privilege by a national banking association is a final decision from which appeal may be taken.

STATUTES INVOLVED

The venue privilege of national banking associations is contained in 12 U.S.C., Section 94, Rev.Stat. §5198 (1878), printed in Appendix A hereto, *infra* p. A-1. The provision for appeals from final decisions of district courts is 28 U.S.C., Section 1291, printed in Appendix A hereto, *infra* p. A-1.

STATEMENT OF THE CASE

This cause was commenced on January 25, 1968, when petitioner filed its complaint in the United States District Court for the District of Minnesota, Third Division, against Sidney P. Abramson ("Abramson"). Federal jurisdiction for this complaint was sought to be based on diversity of citizenship under 28 U.S.C., Section 1332; the complaint alleged that petitioner was a national banking association located in Illinois, that Abramson was a citizen of Minnesota, and that the matter in controversy exceeded (exclusive of interest and costs) the sum of $10,000.

The complaint further alleged that Abramson, a former Assistant United States Attorney and Special Assistant United States Attorney, had aided in the preparation and prosecution of a federal criminal case in which former employees of petitioner had been indicted; that Abramson was thereafter retained as Special Counsel (to act with previously appointed counsel) by Homer A. Bonhiver, Receiver of American Allied Insurance Company ("Receiver"), on the basis of Abramson's knowledge and background gained in the criminal case, to represent Receiver in asserting a $10,500,000 claim against petitioner based on the same alleged transactions as were charged in the indictments and trial of the criminal case; and that Abramson, in thus serving as co-counsel for Receiver in connection with the same matters Abramson had investigated and passed upon while in public employ, was acting in clear violation of Canon 36 of the Canons of Professional Ethics of the American Bar Association.

Abramson responded to the complaint with a counterclaim seeking vindication on the Canon 36 issue, and Receiver was given leave to intervene on the basis of a ten-

dered pleading which was directed solely and exclusively to the Canon 36 issue.

Petitioner moved for a preliminary injunction to restrain further violations of Canon 36. This motion was denied by the District Court. (The District Court's opinion is printed in Appendix C hereto, commencing at page C-1.) On appeal by petitioner, the United States Court of Appeals for the Eighth Circuit ruled on February 15, 1968—without opinion—that the amount in controversy on the Canon 36 issue did not exceed $10,000 and that the federal courts therefore did not possess jurisdiction of the subject matter. Petitioner sought rehearing before the Eighth Circuit, but its petition was denied, and on April 15, 1968, the District Court entered an order dismissing petitioner's complaint pursuant to the mandate of the Eighth Circuit.

Meanwhile, on February 5, 1968, Receiver moved in the District Court for leave to file its $10,500,000 claim against petitioner in the form of a counterclaim as part of a pleading entitled "Amended Answer and Counterclaims of Intervenor." On February 20, 1968, petitioner moved to deny Receiver leave to file the $10,500,000 counterclaim. The grounds relied on for petitioner's motion included improper venue under Rev.Stat. §5198, 12 U.S.C. §94.

On August 20, 1968, the District Court entered an order granting Receiver leave to file the $10,500,000 counterclaim and rejecting petitioner's motion in all respects, including petitioner's objection to venue under 12 U.S.C. §94. The District Court's opinion is printed in Appendix C hereto, commencing at page C-8.

On August 27, 1968, petitioner served its motion in the District Court to amend the order of August 20 to include findings that would have enabled petitioner to apply for

permission to appeal to the Eighth Circuit under the federal law governing appeals from interlocutory orders. (28 U.S.C. 1292(b)) Petitioner's motion to amend was denied by the District Court's order of September 24, entered September 26, 1968. The District Court's memorandum accompanying the order of September 24 is printed in Appendix C hereto, commencing at page C-28.

Although it was petitioner's view when it sought to amend the August 20 order that said order was interlocutory, petitioner reconsidered the question following the order of September 24 and came to the studied conclusion, based on a careful re-examination of this Court's opinion in the case of *Mercantile National Bank at Dallas* v. *Langdeau*, 371 U.S. 555 (1963), that the August 20 order was final and, therefore, appealable.

Accordingly, on October 2, 1968—one week after denial by the District Court of petitioner's motion to amend the August 20 order—petitioner gave notice of appeal to the Eighth Circuit from the August 20 order.

On October 4, 1968, Receiver moved in the Eighth Circuit to dismiss petitioner's appeal on the ground that the August 20 order was "interlocutory in nature and therefore not appealable." Receiver also contended that the notice of appeal had not been timely filed.

On October 14, 1968, the Eighth Circuit entered the order which is the subject of this petition for certiorari. In a two-sentence statement—without opinion—the Eighth Circuit ordered that the appeal be dismissed. The Eighth Circuit's order of October 14 is printed in Appendix B hereto, *infra* page B-1.

To complete the background, it should be mentioned that after the Eighth Circuit had dismissed petitioner's com-

plaint against Abramson on jurisdictional grounds, petitioner raised the same Canon 36 issue as to Abramson in a related case also pending in the United States District Court for the District of Minnesota, Third Division, entitled *Allied Realty of St. Paul* v. *Exchange National Bank of Chicago*. On April 11, 1968, the District Court entered an order finding that Abramson's representation of Allied Realty (a wholly owned subsidiary of American Allied Insurance Company) was a violation of Canon 36 and enjoining Abramson from acting as counsel in any matter involving claims raised in the criminal trial in which Abramson had served as Assistant and Special Assistant United States Attorney. The District Court's opinion is printed in Appendix D hereto, commencing at page D-1. Abramson has appealed to the Eighth Circuit, seeking to reverse the order. and petitioner has cross-appealed, seeking to broaden the order.

REASONS FOR ALLOWANCE OF THE WRIT

Petitioner is a national banking association. Petitioner's plea of venue privilege was overruled in the District Court by order of August 20; petitioner's motion to amend the August 20 order was served on August 27 and was denied by order of September 24, entered September 26; and petitioner gave notice of appeal to the Eighth Circuit on October 2. Since petitioner's 30-day period for appeal under Rule 4 of the Federal Rules of Appellate Procedure did not begin to run until the entry of the order on September 26, it is clear that notice of appeal given on October 2—six days after the entry of the order denying petitioner's motion to amend—was timely.

It is, therefore, apparent that the Eighth Circuit dis-

missed the appeal on the ground that the District Court's order overruling petitioner's plea of venue privilege was interlocutory and not appealable.

We believe that the decision of the Eighth Circuit in this regard is in direct conflict with the decision of this Court in the case of *Mercantile National Bank at Dallas* v. *Langdeau*, 371 U.S. 555 (1963).

In *Langdeau*, a receiver for a Texas insurance company filed an action in Travis County, Texas, against two national banks and 143 other defendants, alleging a conspiracy to defraud the insurance company. Each national bank filed a plea of privilege,

> ". . . asserting that it was located in Dallas County, Texas, and was therefore immune from suit in Travis County under the provisions of Rev.Stat.§5198 (1878) 12 U.S.C. §94, which provides:
>
> " 'Actions and proceedings against any association under this chapter may be had in any district or Territorial court of the United States held within the district in which such association may be established, or in any State. county, or municipal court in the county or city in which said association is located having jurisdiction in similar cases.' " (371 U.S. at 556).

The pleas of the banks were overruled and they appealed. The Texas Court of Civil Appeals reversed and sustained the pleas of privilege. The Texas Supreme Court reversed again and overruled the venue pleas. The banks then appealed to this Court under 28 U.S.C. §1257, which permits appeals in certain cases from "[f]inal judgments or decrees rendered by the highest court of a State."

The rulings in *Langdeau* would seem to have been even less "final" than the ruling in our case. In both cases, a

venue plea was overruled. In *Langdeau*, moreover, there were 143 other defendants in addition to the two national banks, while in the case at bar petitioner is the sole defendant in Receiver's counterclaim.

Mr. Justice White, in his majority opinion in *Langdeau*, recognized that there was a finality question.

> ". . . and, because of the finality question, we postponed ruling upon our jurisdiction until the merits [of the venue plea] were considered" (371 U.S. at 557).

The first section of the majority opinion is devoted to the finality question. Justice White held that the orders denying the venue pleas of the banks were appealable.

> "The question of our appellate jurisdiction is quite similar to the one considered in *Construction Laborers* v. *Curry, ante,* p. 524, although there the jurisdiction of any and all state courts was at issue and here the inquiry is only as to which state court has proper venue to entertain an action against two national banks. Nonetheless, a substantial claim, appealable under state law, is made that a federal statute, rather than a state statute, determines in which state court a national bank may be sued and, as in *Curry,* prohibits further proceedings against the defendants in the state court in which the suit is now pending. *This is a separate and independent matter, anterior to the merits and not enmeshed in the factual and legal issues comprising the plaintiff's cause of action.* Moreover, *we believe that it serves the policy underlying the requirement of finality* in 28 U.S.C. §1257 to determine now in which state court appellants may be tried rather than to subject them, and appellee, to *long and complex litigation which may all be for naught if consideration of the preliminary question of venue is postponed until the conclusion of the proceedings.* Accord-

> ingly, we note our jurisdiction to hear these appeals under §1257(2) and turn now to the question of whether appellants may be sued in the Travis County court." (371 U.S. at 557-558) (Emphasis added.)

The language of *Langdeau* is squarely applicable to the instant case. Petitioner herein has asserted at every opportunity in the courts below that the federal statute governing venue over national banks—the same statute relied upon by the banks in *Langdeau*—prohibits further proceedings in the court in which the $10,500,000 counterclaim is now pending. This venue question—exactly as in *Langdeau*—is a separate and independent matter, anterior to the merits and not enmeshed in the issues comprising Receiver's counterclaim.

Petitioner in this case appealed to the Eighth Circuit under 28 U.S.C. §1291, allowing appeals "from all final decisions of the district courts." We see no difference between "final decisions" under §1291 and "final judgments or decrees" under §1257 (the section involved in *Langdeau*). The "finality" required under federal law is the same, and it will serve the policy underlying that requirement to determine now—just as was done in *Langdeau*—in which court petitioner may be tried rather than to subject petitioner, Receiver and trial court "to long and complex litigation which may all be for naught if consideration of the preliminary question of venue is postponed until the conclusion of the proceedings."

In this connection, petitioner pointed out to the courts below that the criminal case terminated in a verdict of acquittal after three months of trial, and that the trial and pretrial proceedings in the $10,500,000 counterclaim would inevitably be lengthy and complex.

As the *Langdeau* case illustrates, the courts are extremely protective of national banks as to venue. Statutory language which could be interpreted as permissive is interpreted unequivocally as mandatory. Venue restrictions can always be waived, but in the case of national banks, courts are loathe to declare them waived. See, e.g., *Buffum* v. *Chase National Bank*, 192 F.2d 58 (7th Cir. 1951), cert. den. 342 U.S. 914. It has recently been held that the venue privilege of a national bank is not overcome even by the special venue provisions of the Securities Act of 1933 and the Securities Exchange Act of 1934. *Bruns, Nordeman & Co.* v. *American National Bank & Trust Co.*, 394 F.2d 300 (2d Cir. 1968), cert. den. — U.S. —, 89 S.Ct. 97.

In many ways and in numerous decisions, courts have gone out of their way to find a national bank legally immune to suit except in the jurisdiction in which the bank was established and where it maintained its principal place of business—even in the case of banks which operate branches. See, e.g., *Leonardi* v. *Chase National Bank of City of New York*, 81 F.2d 19 (2d Cir. 1936), cert. den. 298 U.S. 677.

In *Langdeau*, this Court passed upon an order with reference to venue which might, in the ordinary case, be considered an interlocutory order and therefore not appealable until final judgment, and held in the case of a national bank that such an order is final and therefore reviewable.

Unless certiorari is granted in the instant case and the Eighth Circuit's dismissal of petitioner's appeal is reversed—a dismissal so clearly in conflict with the decision of this Court in *Langdeau*—petitioner will have to wait until the end of a lengthy trial to re-assert its venue

privilege. By then, petitioner will have already suffered a lengthy interruption in its business as a national bank recognized as an evil in *Langdeau* (371 U.S. at 561 n.12), and the venue privilege expressly granted by Congress to national banks will have been seriously undermined.

CONCLUSION

For all of the foregoing reasons, we ask that this petition for a writ of certiorari be granted.

Respectfully submitted,

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APPENDICES

APPENDIX A
Statutes

Title 12, United States Code, Section 94:

§ 94. Venue of suits

Actions and proceedings against any association under this chapter may be had in any district or Territorial court of the United States held within the district in which such association may be established, or in any State, county, or municipal court in the county or city in which said association is located having jurisdiction in similar cases. R.S. § 5198; Feb. 18, 1875, c. 80, § 1, 18 Stat. 320; Mar. 3, 1911, c. 231, § 291, 36 Stat. 1167.

Title 28, United States Code, Section 1291:

§ 1291. Final decisions of district courts

The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. June 25, 1948, c. 646, 62 Stat. 929; Oct. 31, 1951, c. 655, § 48, 65 Stat. 726; July 7, 1958, Pub.L. 85-508, § 12(e), 72 Stat. 348.

APPENDIX B
Order Below

(Unreported)

Filed October 14, 1968
Robert C. Tucker, Clerk

United States Court of Appeals
For the Eighth Circuit

No. 19469

September Term, 1968

Exchange National Bank of Chicago, etc.,
Appellant,

vs.

Sidney P. Abramson, et al.,
Appellees.

Appeal from the United States District Court for the District of Minnesota.

Judgment

The Court has considered a motion filed by counsel for appellees requesting dismissal of this appeal together with supporting and opposing memorandums. Being fully ad-

vised in the premises, it is now here ordered that this appeal be, and it is hereby, dismissed.

Mandate forthwith.

October 14, 1968

Order entered at direction of Court.

ROBERT TUCKER,

Clerk, U.S. Court of Appeals, 8th Circuit.

APPENDIX C

Opinions Below

United States District Court
District of Minnesota
Third Division

No. 3-68 Civ. 24

Exchange National Bank of Chicago, a national banking association,

Plaintiff,

vs.

Sidney P. Abramson,

Defendant.

Order

(February 3, 19[illegible]8)

Reported at 278 F. Supp. 849 (1968)

The above matter came on for hearing before the undersigned, a judge of this court at St. Paul, Minnesota, on January 27, 1968, on the motion of plaintiff for a preliminary injunction. Appearances for plaintiff in support of the motion were Best, Flanagan, Lewis, Simonet & Bellows by Leonard Simonet and Harold Evarts, Esqs., 1200 First National Bank Building, Minneapolis; D'Ancona, Pflaum, Wyatt & Riskind by Edgar Bernhard, Esq., 33 North La-

Salle Street, Chicago, Illinois; Raskin, Downing & Dammann by Robert J. Downing, Esq., 105 South LaSalle Street, Chicago, Illinois. O'Connor, Collins & Abramson by Theodore J. Collins, Esq., 1001 Degree of Honor Bldg., St. Paul, appeared for defendant in opposition to the motion. Briggs & Morgan by David Forsberg and Sam Hanson, Esqs. appeared for Homer A. Bonhiver, the court appointed Receiver of American Allied Insurance Company and submitted an application to intervene as a party defendant. He was permitted by the court to participate in the proceedings and subsequently on January 31, 1968, the court entered an order without objection permitting intervention by said receiver and the filing and serving of his answer and counterclaim.

The court has examined the pleadings, the motion papers and accompanying affidavits, has heard the testimony adduced at the hearing and has read and examined the excellent briefs filed by the various parties. On the basis thereof, and on the basis of all of the files, records and proceedings herein,

IT IS ORDERED That the motion of plaintiff be, and the same hereby is, in all things denied.

Dated: February 3, 1968.

/s/ PHILIP NEVILLE,
United States District Judge.

MEMORANDUM

The above-entitled action has been filed with this court seeking to enjoin the defendant, now an attorney in private practice in Minnesota, from acting and serving as one

of the attorneys for the court appointed Receiver of American Allied Insurance Co., now defunct. The action further seeks to restrain defendant's "agents, servants, employees and attorneys, and all persons in active concert or participation with him or who receive actual notice of the order [of this court] . . ." from instituting legal action against plaintiff and from in effect using documents or information known to or now or heretofore within the knowledge of defendant. The receiver has indicated his clear intention to sue the plaintiff, a Chicago banking institution, for some $10,500,000.00, alleging fraud on its part. More than two months ago the receiver furnished plaintiff with a draft complaint in the proposed action.

Before being retained as an attorney for the receiver, defendant, now 31 years of age, had been retained as a special United States District Attorney, succeeding his prior full-time employment as an assistant United States Attorney, to assist and act as "second chair" for the federal prosecutor in the trial of a criminal case brought by the United States against numerous defendants, including three former officers of plaintiff. Many, if not all, of the same issues which were involved in the abortive criminal trial will be in the fore in the prospective lawsuit to be brought against plaintiff by the receiver. Defendant was intimately associated on the government's side with the trial of the criminal case and sat through some 13 weeks of trial, now recorded in a typed transcript of approximately 17,000 pages. He became aware of, or certainly had access to, various FBI and postal inspectors' written and oral reports and had knowledge of, and available to him, the grand jury minutes and all grand jury and government exhibits. He assisted extensively in the trial preparation.

Prior to the institution of the criminal action by the federal government, a number of plaintiff's records were subpoenaed and submitted to or used before the indicting grand jury. Defendant, though then employed as an assistant United States Attorney, testified that he had little or nothing to do with the case at the grand jury stage. Many of the same documents, however, and perhaps others were actually used in the criminal trial.

Some several months after completion of the criminal trial resulting in not guilty verdicts, the American Allied receiver requested defendant to associate himself as one of the counsel in the prospective suit against plaintiff above mentioned. The receiver did this for the reason, as set out in his petition to the District Court of Ramsey County, Minnesota, that:

> "The employment of Mr. Sidney P. Abramson as special counsel in these matters should, in the opinion of the petitioner, be generally advantageous to the receiver ship estate and should likewise result in substantial over-all saving of legal time and expense to the estate by virtue of the extensive knowledge and background Mr. Abramson now has in respect to matters particularly relating to the Exchange National Bank of Chicago as a result of his participation as Special Assistant to the United States Attorney in the criminal trials recently concluded at Bismarck, North Dakota, involving the trial of certain former officers of American Allied Insurance Company and Allied Realty of St. Paul, Inc."

Plaintiff claims defendant is guilty of a breach of Canon 36 of the American Bar Association's Canons of Ethics

(heretofore adopted by the Minnesota Supreme Court) and so should be enjoined from acting as attorney for the receiver. Canon 36 provides as follows:

> "A lawyer should not accept employment as an advocate in any matter upon the merits of which he has previously acted in a judicial capacity.
>
> A lawyer, having once held public office or having been in the public employ, should not after his retirement accept employment in connection with any matter which he has investigated or passed upon while in such office or employ."

Plaintiff asserts irreparable harm to itself if defendant be not enjoined and its other relief be denied.

On this hearing for preliminary injunction, the court need not and does not determine the merits of the case. The court at this juncture inquires only whether immediate and irreparable harm will befall the plaintiff, Exchange National Bank, if injunctive relief against the filing of the lawsuit with defendant as counsel is not granted. Herein lies a weak link in plaintiff's present motion. In the court's view, there is no substantial evidence that, upon the filing of a lawsuit by the receiver, whether or not defendant acts as counsel, plaintiff will sustain "immediate and irreparable harm." The only harm plaintiff alleges is that which might flow from widespread publicity in Chicago and elsewhere when the suit is filed which, it states, "would undermine the confidence of plaintiff's depositors and customers."

The complaint in the case at bar asserts that the Exchange National Bank is the sixth largest National bank in the state of Illinois, that it has $245,000,000.00 in deposits, 40,000 accounts, and 230 correspondent banks, lo-

cally and internationally. That the filing of a lawsuit in the amount of $10,500,000 charging fraud might be an embarrassment to the bank no one can doubt; nor can anyone doubt that if any damage actually is sustained by the filing of the lawsuit, it would be most difficult to attempt to assess such and to make recovery in an action at law. Plaintiff's position, however, ignores the fact that:

(1) It was first furnished with a draft complaint of the proposed lawsuit more than two months ago, in November, 1967, in which defendant was designated as attorney for the receiver and in a period of two months or more it made no application for his removal to the Ramsey County District Court which approved the appointment and hiring of defendant;

(2) There are now on file at least two other lawsuits, one in Minnesota and apparently another—the subject of an offer of proof at the hearing—filed some time ago in Illinois, in at least the former of which plaintiff to a greater or lesser extent is charged with fraud;

(3) The draft complaint is in fact now on file with this court, with all its allegation of fraud and misconduct, by virtue of plaintiff's own actions in filing it and so the same is now a public record and available to all;

(4) Even were this court to grant plaintiff the relief requested, it is a compelling inference from the evidence and the posture of matters presently that without too much delay, some other counsel would be employed by the receiver and in due course would commence an action with allegations similar to the draft complaint. The transcript of the criminal trial is available, and certainly discovery proceedings in a civil action under the Federal Rules of Civil Pro-

cedure would disclose substantially the same documentary evidence and facts as are now in the possession of defendant. Granting plaintiff's request would seem therefore not to remove the alleged injury and harm flowing from publicity, if such it be, but at best only to delay it. Any person in business, including a national bank, must bear with, and be subjected to the hazard of, adverse publicity that may arise on the filing of a lawsuit. Thousands are filed daily in the United States and "immediate and irreparable harm" does not necessarily or very often follow. This is true whether or not a particular plaintiff's attorney is extremely knowledgeable and sophisticated or completely inept. The result is the same publicity-wise and there is no, or at best a very slight, sequitur between the character or knowledge of counsel for a particular plaintiff and the amount of adverse publicity engendered. The removal or enjoining of defendant in this case does not cure or remove plaintiff's claimed cause for worry. Of course, to suppress or grant immunity to all evidence, knowledge and information which the receiver now has or ever acquired by and through defendant Abramson might render it impossible, if literally complied with, for the receiver to institute any action at all. The court is quite unwilling to accept this basis for the granting of a preliminary injunction without further serious consideration on a trial of the merits.

Quaere whether the filing of even a wholly groundless lawsuit with its attendant adverse publicity, absent proof of deliberate intent showing malicious prosecution on a plaintiff's part, gives rise to a cause of action at all. Courts are open to all litigants, to the press and to the public. The consequences thereof which is what plaintiff here claims to cause irreparable harm, are not alleviated by removal of a

particular attorney who is representing a party plaintiff, nor it would seem materially lessened merely by delay.

For all of the reasons above, plaintiff's motion for a preliminary injunction is denied.

Order and Memorandum

(August 20, 1968)

Reporter at 45 F.R.D. 97

The above-entitled matter came on for hearing before the undersigned, a judge of this court on July 8, 1968 at St. Paul, Minnesota, on the motion of the plaintiff for an order (1) amending a prior order of this court granting leave to intervene; (2) denying leave to the intervenor to file an amended answer and counterclaims; and (3) expunging the amended answer and counterclaims from the record. Concurrently, the court heard intervenor's motion for an order detemining that the pleadings stand amended in accordance with its amended answer and counterclaims filed on February 5, 1968, or alternatively, granting the intervenor leave to file such pleadings *nunc pro tunc* as of January 31, 1968.

Best, Flanagan, Lewis, Simonet and Bellows by Leonard W. Simonet, Esq., Minneapolis, Minnesota; D'Ancona, Pflaum, Wyatt & Riskind by Edgar Bernhard, Esq., Chicago, Illinois; and Raskin, Downing & Dammann by Robert J. Downing, Esq., Chicago, Illinois, appeared for plaintiff. Briggs and Morgan by David C. Forsberg, Esq., St. Paul, Minnesota, appeared for Intervenor.

The court, having heard the arguments of counsel, having considered the lengthy memoranda submitted by the parties and upon all the files, records and proceedings herein, makes the following order:

IT IS ORDERED That the motion of plaintiff be, and the same hereby is, in all things denied.

IT IS FURTHER ORDERED That the alternative portion of intervenor's motion be, and the same hereby is, granted.

Dated: August 20, 1968.

/s/ PHILIP NEVILLE,
United States District Judge.

NEVILLE, District Judge.

This case raises the interesting question as to whether an intervenor who has filed a counterclaim against the plaintiff prior to an involuntary dismissal of plaintiff's complaint is entitled to proceed thereafter on his counterclaim, which independently meets jurisdictional requirements, despite plaintiff's objection. Several collateral and subsidiary questions first must be answered to arrive at the conclusion reached by this court to the effect that the intervenor here has such a right and may proceed to trial on his counterclaim.

When this matter first came before this court, plaintiff Exchange National Bank of Chicago argued vehemently and at great length that the threatened filing of a suit in Chicago, Illinois for $10,500,000.00 by the intervenor, the Receiver for American Allied Insurance Company, would cause it irreparable harm. See *Exchange Nat'l Bank* v. *Abramson*, 278 F. Supp. 849 (D. Minn. 1968). Now that the intervenor has obliged and has filed his $10,500,000 suit in the District of Minnesota by way of a counterclaim, plaintiff is arguing just as vehemently and lengthily that such is an improper venue and the counterclaim legally will

not lie. It now in effect urges that suit, if to be brought, should be venued in Chicago. The court cannot blame the plaintiff nor its counsel for not wanting to be sued, but it is obvious that sooner or later plaintiff is going to become a defendant and be required to answer in a suit. This court believes that the District of Minnesota is the proper forum and that the case should proceed here forthwith on the Receiver's counterclaim. A short review of the history of the case is necessary to an understanding of the court's ruling.

Plaintiff is a national banking institution with its principal place of business at Chicago, Illinois. Defendant Abramson is an attorney at law and a citizen of Minnesota. American Allied Insurance Company (Allied) is incorporated under Minnesota law and maintained its principal place of business therein. Its court appointed Receiver, Homer A. Bonhiver, also is a Minnesota citizen.

In 1965 a federal grand jury sitting in Minnesota returned indictments against some 14 or more individuals for alleged criminal activity involving the failure and ultimate insolvency of Allied. Three former employees of the plaintiff Bank were among those so indicted. Abramson, an attorney at law and a member of the Minnesota Bar, had been as Assistant United States Attorney when the indictments were returned, though he was not involved with the matter at that time. Subsequently, as a Special Assistant United States Attorney he aided and assisted the United States Attorney in prosecuting the criminal case. He sat through the entire lengthy trial held at Bismarck, North Dakota, culminating in verdicts of acquittal. The charges there were in the nature of criminal fraud and in part related to various transactions between the Exchange National Bank and Allied. Numerous lesser charges were also

made. Abramson returned to the private practice of law in Minnesota upon completion of the criminal trial. His knowledge of the Allied-Exchange Bank transactions apparently motivated the Receiver to offer Abramson a position as co-counsel in winding up Allied's affairs. Thereafter, he was duly appointed as an attorney for the Receiver by the Ramsey County Court and has since served as a co-counsel. Abramson proceeded to give legal advice regarding divers matters, one of which culminated in a proposed and so-called "draft complaint" venued in Federal District Court in Illinois naming the Receiver as plaintiff and the Exchange National Bank (plaintiff here) as defendant. This was submitted as a courtesy between counsel to advise of the nature of the action to be instituted and apparently as a part of preliminary settlement negotiations. The Receiver gave notice that suit would be commenced upon expiration of a given period of time. Prior to such date, however, and on January 25, 1968, the plaintiff Bank filed its complaint in the above action with this court in Minnesota naming Abramson as defendant attaching a copy of the "draft complaint" and seeking injunctive relief for an alleged continuing violation of Canon 36 of the American Bar Association Canons of Professional Ethics. The complaint sought relief enjoining Abramson:

> "his agents, servants, employees and attorneys, and all persons in active concert or participation with him or with them who receive actual notice of the order . . ."

from (1)

> "filing in the United States District Court in Chicago or elsewhere the draft complaint . . . or any other complaint involving any of the same matters alleged in

said draft complaint and prepared by or with the assistance (whether direct or indirect) of Defendant;"

(2)

"using in any manner adverse to Plaintiff, or disclosing or transmitting to any other person or persons for such use, any and all documents, correspondence, Grand Jury minutes, evidence, knowledge, information or background material learned about, examined or obtained by Defendant . . ."

and (3)

"further participation as or with counsel or co-counsel for Homer A. Bonhiver as Receiver . . . and whether such participation be in the form of attendance at meetings, appearances in Court, advice or assistance (whether direct or indirect) to counsel or co-counsel of record, or otherwise."

Abramson duly answered, opposing the action and counterclaims for damages for abuse of process. This counterclaim is not now before this court.

Plaintiff's motion for a temporary injunction was heard on January 27, 1968. Allied, by and through its Receiver, appeared at this hearing and requested leave to participate in the proceedings as an intervenor. Such leave was conditionally granted with the plaintiff reserving its objection until subsequent production and review of the intervenor's proposed answer and counterclaim. Intervenor served the same upon the plaintiff on January 31, 1968. The counterclaim therein sought declaratory relief against the plaintiff to the effect that Abramson was properly employed and

was not in contravention of Canon 36. Without objection of plaintiff, the Receiver was allowed to intervene as a matter of right pursuant to Rule 24(a), Fed. R. Civ. P., by an order of this court dated January 31, 1968.

By order filed February 5, 1968, this court denied plaintiff's motion for a temporary injunction. The intervenor, Allied, on February 5, 1968 filed an "Amended Answer and Counterclaims," restating in substance the prior answer and counterclaim, but additionally alleging a counterclaim against the plaintiff seeking recovery of $10,500,000.00 damages. This counterclaim is substantially identical to the so-called "draft complaint" annexed as Exhibit D to the plaintiff's complaint in this action against Abramson. This counterclaim was stated not to have been submitted to plaintiff's counsel or the court with the original proposed answer and counterclaim because of a stipulation between counsel prohibiting such filing before the expiration of an agreed time lapse. Like the "draft complaint", the counterclaim alleges rights to recover damages for losses occurring in the Allied-Exchange Bank transactions which formed the basis of many charges underlying the criminal trial at Bismarck.

Plaintiff filed an appeal and an application for stay and injunction pending appeal from the order of this court filed January 5th and denying temporary injunctive relief. See *Exchange Nat'l Bank of Chicago* v. *Abramson*, 278 F. Supp. 849 (D. Minn. 1968). By order dated February 15, 1968, after oral argument, the Eighth Circuit Court of Appeals denied the application for stay and injunction pending appeal and remanded the cause to this court "with directions to dismiss the complaint for lack of [subject matter] jurisdiction" in that it was not shown that the amount

in controversy, exclusive of interest and costs, exceeded $10,000.00. In a companion case, where it does not seem there can be any doubt as to jurisdiction, this court disqualified Abramson for a violation of Canon 36. *Allied Realty Co.* v. *Exchange Nat'l Bank of Chicago,* 283 F. Supp. 464 (D. Minn. 1968).

The motions now before the court are by defendant to strike and expunge intervenor's $10,500,000.00 counterclaim and by intervenor requesting a determination that said counterclaim is properly filed or if not, that leave therefor be granted.

The parties dispute several legal questions. First, whether plaintiff has waived its ability now to be able to object to the intervention "as a matter of right?" Second, whether if there be no waiver the Receiver is not entitled to intervene "as a matter of right" in any event? Third, whether an intervenor has a right under Rule 24 to counterclaim against the original plaintiff? Fourth, whether the plaintiff waived the venue privilege accorded national banking concerns by 12 U.S.C. § 94 (1964)? Fifth and last, whether a dismissal of the plaintiff's complaint on appeal for a jurisdictional defect affects an intervenor's previously filed counterclaim so as to require its dismissal?

FIRST

Initially the question raised by the foregoing facts is whether the plaintiff Bank waived its right to object to the intervention of the Receiver as a matter of right under Rule 24 (a) (as distinguished from permissible intervention under Rule 24 (b)) by not appearing in opposition to the motion for leave to intervene. The motion to intervene which requested "leave to intervene as a matter of right"

was served on and exhibited to plaintiff. Plaintiff alleges however it did not see the order allowing intervention prior to its entry (see plaintiff's moving papers of February 19, 1968). It is true that this motion did not have attached to it the $10,500,000.00 counterclaim but only a pleading relating to Abramson's services as attorney. Inasmuch as the Receiver complied with Rule 24(c) which requires that "The motion shall state the grounds therefor . . ." it becomes difficult to accede to the plaintiff's contention seeking another opportunity to challenge intervention as a matter of right. The Receiver's basis for intervention as a matter of right was set out in the moving papers showing him to have an "interest" which the disposition of the action might "impair or impede." The subsequent amendment including the additional counterclaim did not add any information going to this criteria as set forth in Rule 24(a). It is noted that plaintiff made no objection to the motion to intervene. It may well be that plaintiff would have objected had it known the intended scope of the Receiver's intervention, but such fact, if true, does not relate to the question of whether the Receiver is entitled to intervene "as a matter of right." In the court's judgment, plaintiff has waived its right to object to the Receiver's motion for leave to intervene as a matter of right. Plaintiff had all information pertaining to the right to intervene before it when the Receiver duly made its motion. It failed to oppose said motion. It can not now return to argue a right neglected the first time. Thus, the Receiver is an intervenor of right pursuant to Rule 24(a).

SECOND

Assuming *arguendo,* however, that the Bank's right to object was not waived by failure timely to assert it, cf.

Salem Eng'r Co. v. *National Supply Co.*, 75 F. Supp. 993 (W.D. Pa. 1948); *E. G. Staude Mfg. Co.* v. *Berles Carton Co.*, 31 F. Supp. 178 (E.D. N.Y. 1939), the Receiver appears to qualify for intervention as a matter of right under Rule 24(a) in any event.[1] This rule sets forth three criteria prerequisite to the right to intervene as a matter of right; first, the applicant must claim ". . . an interest relating to the property or transaction which is the subject of the action; . . ." second, the applicant must be ". . . so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest; . . ." and third, the applicant's interest must be inadequately represented by the existing parties. Each of the above elements justifying intervention must be fulfilled. In the matter at hand, they are satisfied.

Plaintiff's action against Abramson sought sundry relief. It sought to enjoin Abramson, ". . . his agents, servants, employees and attorneys and all persons in active concert or participation with him . . ." from filing the "draft complaint," using or disclosing various documents and information, and several lesser items of relief. Not only did the Receiver have a substantial interest in any possible injunctive relief by virtue of being the plaintiff in the "draft complaint," but in addition, he certainly had a large interest in the ethical charges against his counsel of record as well as an interest in having the counsel of his choice. Since the

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[1]Rule 24(a) reads:

"Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties."

language of the complaint arguably encompasses the Receiver as one against whom the injunction would run, it is inconceivable that the Receiver can be said to have no interest. Moreover, in the Advisory Committee's Note to Rule 24, amended in 1966, it is noted that a party, albeit a tentative class member, should not need to risk collateral attack to escape the effect of a judgment which might run against him, but rather should be permitted to intervene. 28 U.S.C.A., Fed. R. Civ. P. 24 (Supp. 1967). Hence, here, where the Receiver might be barred from instituting the lawsuit under the injunction sought against its counsel, the intervention should be granted. The same reasons indicate that the second factor of Rule 24(a) is fulfilled. An injunction against Abramson from participating in the action would preclude the Receiver from retaining Abramson as co-counsel in the action planned against the Bank. Surely this constitutes a situation where the disposition could severely affect his interests and "impair or impede" his protection thereof.

Thus the final question remaining is whether or not the Receiver's interest was adequately protected by Abramson. There is some doubt as to the correct standard applicable in determining adequacy of representation. Compare *Stadin* v. *Union Elec. Co.*, 309 F. 2d 912 (8th Cir. 1962), *cert. denied* 373 U.S. 915 (1963), and *Peterson* v. *United States*, 41 F.R.D. 131 (D. Minn. 1966), with *Kozak v. Wells*, 278 F. 2d 104 (8th Cir. 1960). See generally Annot, 84 A.L.R. 2d 1412 (1962). This is particularly true since *Cascade Natural Gas Corp.* v. *El Paso Natural Gas Co.*, 386 U.S. 129, 87 S. Ct. 932, 17 L. Ed. 2d 814 (1967), where the court apparently liberalized the previous standard in favor of intervention when the interests of the existing par-

ties and the intervening applicant differ. Conceding that Abramson had substantial interest in the controversy because of potential legal fees[2] for his representation, and that Abramson and the Receiver both sought to maintain the existing attorney-client relationship, nevertheless, the Receiver's interest in so preserving the status quo appears to differ significantly from Abramson's, and hence Abramson's representation might not adequately represent the applicant's interests. The Receiver would necessarily be far more interested in preserving his own right to bring the action against the Bank, and accordingly would better protect himself from a broad injunction which might go further than enjoining only Abramson from participating. The inadequacy of representation need not be shown to a certainty. *Kozak* v. *Wells, supra.* Indeed, the burden under amended Rule 24(a) may well be on the party objecting to intervention. See Moore, *Federal Practice* ¶ 24.08 (Supp. 1967). Such burden the Bank has not sustained. In light of the interests of Abramson and the Receiver, combined with the general liberal nature of amended Rule 24(a), the Receiver is entitled to intervene as a matter of right. This is true irrespective of whether the Bank can be held to have waived its objection to intervention originally.

THIRD

Since in this court's view the Receiver is entitled to intervene in this action as a matter of right, the next question concerns the scope of participation of such an intervenor. Specifically, the question relates to whether an intervenor

[2]The order of the Ramsey County District Court dated November 21, 1967 appointing Abramson as co-counsel for the Receiver established his compensation in an amount up to $12,000 and provided application could be made to the court for additional payments.

can assert affirmatively a counterclaim for relief against the original plaintiff, and, if so, the nature of the counterclaim which can be so asserted. At the outset it is to be noted that the authorities are in disagreement as to the proper treatment to be accorded counterclaims asserted by an intervenor. Many authoritative commentators on federal procedure state that an intervenor of right can file any counterclaim then available, either compulsory or permissive under Rule 13, see 4 Moore, *Federal Practice* ¶ 24.-17, at 135 (1967 ed.); 2 Barron & Holtzoff, *Federal Practice & Procedure* § 603.1 (Wright ed. 1961); Wright, *Federal Courts* § 75 (1963). Others have concluded that even intervention of right can be subordinated to the main action and that unduly broad or unrelated counterclaims need not be permitted, see Shapiro, *Some Thoughts on Intervention Before Courts, Agencies, and Arbitrators,* 81 *Harv. L. Rev.* 721, 754-55 (1968).

The objection to permitting an intervenor leave to file any counterclaim regardless of its relation to the case is based upon the unfairness to the plaintiff who suddenly may find himself confronted with substantial exposure to a litigant he never sued. Moreover, the counterclaim may result in substantially increased litigation than in the first instance. These arguments, however, presuppose a surprised plaintiff. When intervention of right is granted pursuant to Rule 24(a), it becomes exceptionally difficult to say that the plaintiff should not be bound to respond to any counterclaim asserted, for the plaintiff presumably knew or should have known that an interested party would enter the lawsuit by the vehicle of Rule 24(a), or, in fact, would need to be brought into the lawsuit under Rule 19(a) if such were raised. Since the plaintiff should have contem-

plated that the Receiver might well intervene as of right under Rule 24(a) or be joined under Rule 19(a)(2)(i), plus the fact that Rule 13 does not distinguish between intervenors and other pleaders in speaking to counterclaim obligations and rights, the result best accommodating the language of the Rule and fairness to the parties permits the Receiver's counterclaim to stand. This accords with the literal language of Rule 13 and comports with the interpretation given Rule 24 and Rule 13 by the leading authorities in the area. Rules of procedure should not be used to immunize plaintiffs from counterclaims, either permissive or compulsory, but rather should attempt to encourage litigation of all claims existing between the participants to a lawsuit, especially when no prejudice results to the parties. Since the Receiver at bar intervened as a party of right, the counterclaim asserted against the Bank may stand. The propriety of this result is consistent with most modern cases discussing the problem of scope of intervention. See, e.g., *Stewart-Warner Corp.* v. *Westinghouse Elec. Corp.*, 325 F. 2d 822 (2d Cir. 1963), *cert. denied*, 376 U.S. 944 (1964); *United States* v. *Martin*, 267 F. 2d 764 (10th Cir. 1959); *Lenz* v. *Wagner*, 240 F. 2d 666 (5th Cir. 1957); *Switzer Bros. Inc.* v. *Locklin*, 207 F. 2d 483 (7th Cir. 1953), *cert. denied*, 347 U.S. 912 (1954); *California* v. *United States*, 180 F. 2d 596 (9th Cir. 1950). Since the Receiver's counterclaim is at least a permissive counterclaim under Rule 13(b), which is conceded by the plaintiff, this court must permit its filing when intervention is of right.

Even if the plaintiff were correct in its contention that an intervenor cannot assert any type of counterclaim against an opposing party, it is clear that an intervenor is permitted to assert a "related" counterclaim. *Stewart-War-*

ner Corp. v. *Westinghouse Elec. Corp., supra; United States* v. *Martin, supra; Lenz* v. *Wagner, supra; Switzer Bros., Inc.* v. *Locklin; supra. Chandler & Price Co.* v. *Brandtjen & Kluge, Inc.*, 296 U.S. 53 (1935) and its progeny, principally relied upon by the plaintiff, are inapposite to the Receiver's counterclaim which clearly in this court's opinion is related to the main action. The counterclaim thus may stand even assuming that *Brandtjen*, which was decided prior to promulgation of the Federal Rules of Civil Procedure, is still good law. Cf. *Switzer Bros., Inc.* v. *Locklin*, 207 F. 2d 483 (7th Cir. 1953), *cert. denied*, 347 U.S. 912 (1954).

That the counterclaim is related to the main action against Abramson is illustrated by the fact that plaintiff appended a copy of the "draft complaint" to its complaint against Abramson in this action. Surely a suit to enjoin the filing of a complaint, suppression of certain documents and participation by an attorney is related legally and logically to the proposed complaint itself. While the underlying theory expressed in the counterclaim by the Receiver sounds in fraud in numerous transactions, and so does not rely upon the facts or legal theories pressed in the suit against the defendant herein, nevertheless, the counterclaim is related significantly in that the purpose of the suit against Abramson sought to enjoin the filing of the very counterclaim (then in the form of a "draft complaint"). Such relationship, admittedly somewhat unique because of the nature of the suit against Abramson, satisfies the "related" doctrine espoused in the above cases.

Plaintiff further contends that under Rule 13 (f), the court may pass upon the propriety of the counterclaim since it was not filed at the time of the motion papers for leave to

intervene. The intervenor, on the other hand, argues that he was entitled to amend as of right under Rule 15. Since Rule 13(f) speaks specifically to the problem of "omitted counterclaims", while Rule 15 is general with regard to amendments, the former controls. 3 Moore, *Federal Practice* ¶ 13.33 (1961 ed.). In any event, under Rule 13(f), the counterclaim is permitted, since there is absolutely no showing of inexcusable delay, neglect or lack of good faith in asserting the claim. The claim was unavailable to the intervenor originally by virtue of the stipulation between counsel. It was asserted forthwith when the time period specified in that agreement terminated.

FOURTH

Having determined that the counterclaim filed by the Receiver is appropriate under Rule 24 and Rule 13, there arises the question earnestly argued by the plaintiff Bank whether 12 U.S.C. § 94 (1964), the general venue provision for national banks, prohibits the Receiver from asserting the counterclaim. This problem is best analyzed in two parts: first, whether or not venue would be waived on the counterclaim if it had been asserted by an original party defendant named by the Bank; and second, if so, whether the result is altered because the counterclaimant is an intervenor of right under Rule 24(a).

12 U.S.C. § 94[3] provides in full as follows:

> "Actions and proceedings against any association under this chapter may be had in any district or Territorial court of the United States held within the dis-

[3]For a through analysis of this provision, see Note, *An Assault on the Venue Sanctuary of National Banks*, 34 *Geo. Wash. L. Rev.* 763 (1966) and Annot., 1 A.L.R.3d 904 (1965). Waiver of venue privileges in general is covered in Annot., 5 L.Ed2d 1065.

> trict in which such association may be established, or in any State, county, or municipal court in the county or city in which said association is located having jurisdiction in similar cases."

It is well established that the section creates a personal privilege for national banks, and that the privilege may be effectively waived by conduct or consent to suit in an otherwise improper forum. *Michigan Nat'l Bank* v. *Robertson,* 372 U.S. 591, 83 S. Ct. 914, 9 L. Ed. 2d 961 (1963) (per curiam); *Buffum* v. *Chase Nat'l Bank,* 192 F. 2d 58 (7th Cir. 1951), *cert. denied,* 342 U.S. 944, 72 S. Ct. 556, 96 L. Ed. 702 (1952); *First National Bank* v. *Morgan,* 132 U.S. 141, 10 S. Ct. 37, 33 L. Ed. 282 (1889). The narrow question here is whether the plaintiff Bank, by bringing its action in this court to enjoin Abramson, waived its privilege to be sued only where located for venue purposes. Both parties agree that but for waiver of such privilege, the plaintiff Bank is established and located in Illinois for purposes of 12 U.S.C. § 94, and that an original proceedings in this court against the Bank could not be maintained.

The court holds the plaintiff waived its right to object to improper venue by commencing in this district an action to enjoin Abramson from various acts of participation in the action styled "draft complaint." Under the rule announced in *General Elec. Co.* v. *Marvel Rare Metals Co.,* 287 U.S. 430 (1932), a plaintiff waives venue privileges with respect to any counterclaim, either permissive or compulsory, when he commences an action in a forum where venue otherwise would not lie. Although plaintiff points out that the *General Elec. Co.* case arose under another

venue statute relating to proper forums for actions involving certain patent litigation, plaintiff fails to cite any authority for the proposition that venue under the national banking venue provision is not waived by similar acts. Thus, under the aforesaid case, plaintiff waived its 12 U.S.C. § 94 privilege with regard to any counterclaim that might have been filed by Abramson, the original defendant.

Of course a finding of waiver with respect to the original named defendant does not necessarily indicate waiver as to an intervenor. See *Brandtjen & Kluge, Inc.* v. *Joseph Freeman, Inc.*, 75 F. 2d 472 (2d Cir. 1935), *aff'd on other grounds sub nom. Chandler & Price Co.* v. *Brandtjen & Kluge, Inc.*, 296 U.S. 53 (1935). In *Brandtjen & Kluge, Inc.*, Judge Learned Hand held that by commencing an action the plaintiff had not waived its venue privileges against an intervenor counterclaiming for affirmative relief. However, the Judge did note that in some instances, a finding of waiver would be appropriate, for example, when the plaintiff should have such knowledge of probable intervention that he could anticipate a counterclaim from the intervenor. That thought was followed in *Stewart-Warner Corp.* v. *Westinghouse Elec. Corp.*, 325 F. 2d 822 (2d Cir. 1963), *cert. denied* 376 U.S. 944, 84 S. Ct. 800, 11 L. Ed. 2d 767 (1964), where the Second Circuit Court of Appeals held that the plaintiff had waived its venue privileges to suit in a different forum. There the court stated the venue conclusion as follows:

> "Stewart-Warner having chosen to bring the suit in the Western District of New York, we can see no objection to having all these matters passed upon by that court. The suit was in essence brought against Canadian as well as against Westinghouse and surely it was

> brought with full knowledge on Stewart-Warner's part that Canadian would probably intervene. Thus Stewart-Warner has waived the objection to venue which it advanced as a second ground in support of its motion and which it otherwise would have by reason of its not doing business in the Western District and so far as the record shows not having committed acts of infringement therein. Of course, the district court may deny an intervenor the opportunity to raise permissive counterclaims wholly unrelated to the litigation between the plaintiff and the original defendant. But where, as here, because of the interrelationship of the plaintiff's and the intervenor's claims the interposition of counterclaims may properly be permitted no real prejudice can result to the plaintiff from the denial of his objection to venue. See 3 Moore, Federal Practice 45."

325 F. 2d at 827-28. This view comports fully with the view taken by Professor Moore in Moore, *Federal Practice* ¶ 13.16, at 45 (1961 ed.). Inasmuch as the plaintiff could adequately foresee that an intervenor might well seek to file his counterclaims upon intervening in the litigation, it is difficult to distinguish the venue problem when a named defendant counterclaims. Moreover, as was shown above, the counterclaim asserted by the Receiver was related to the suit brought by the Bank to enjoin Abramson. Surely the plaintiff must have supposed the Receiver might attempt to intervene. Even more likely, the plaintiff must have considered the possibility of the filing of the counterclaim in its suit against Abramson and in fact attached to the plaintiff's complaint in the form of a "draft complaint" as an ex-

hibit thereto and which plaintiff contended originally would do it irreparable harm if filed in Chicago. While it is true that the Bank did not specifically choose the Receiver as an antogonist in this action, it should have anticipated the intervention and assertion of rights against the Bank in the action by the vehicle of counterclaim. It is not unjust to find that the Bank risked subjection to a counterclaim in the nature of the "draft complaint" it sought to enjoin from filing. The *Stewart-Warner* result thus appears more fit for the facts of this case than the result reached by Judge Hand in the *Brandtjen* case. Accordingly, it is held that the Bank waived its 12 U.S.C. § 94 privilege with regard to the counterclaim asserted by the Receiver herein.

FIFTH

The final question presented is whether the dismissal of the original action by the Court of Appeals for lack of jurisdictional amount in controversy renders this court without jurisdiction to hear the counterclaim asserted by the Receiver. The court answers this question in the negative. In *Switzer Bros., Inc.* v. *Chicago Cardboard Co.*, 252 F. 2d 407 (7th Cir. 1958) the Court of Appeals held that the District Court did have jurisdiction to entertain an intervenor's later-filed antitrust counterclaim, because such was supported by an independent ground of federal jurisdiction (i.e., 15 U.S.C. § 15). As noted by the court, 252 F. 2d at 410:

> "It appears to be settled that where a counterclaim states a cause of action seeking affirmative relief independent of that stated in the complaint, the dismissal of the complaint does not preclude a trial and determination of the issues presented by the counterclaim. [citing cases.]"

See also, *Magdoff* v. *Saphin Television & Appliance, Inc.*, 228 F. 2d 214 (5th Cir. 1955) (per curiam) where it was held that an intervenor who presented an independent counterclaim against the original plaintiff may maintain that counterclaim even though the original action between plaintiff and defendant has been dismissed. Plaintiff relies on three cases which involve not counterclaims but motions to intervene: *Robertson* v. *Gallion*, 282 F. Supp. 157 (M.D. Ala. 1968); *Davis* v. *Jury Comm'n of Montgomery County*, 261 F. Supp. 591 (M.D. Ala. 1966); and *Mattice* v. *Meyer*, 353 F. 2d 316 (8th Cir. 1965). A reading of these cases indicates that the motions to intervene in each instance alleged substantially the same facts and request for relief as did the original complaint, and therefore, the dismissal of the original complaint resulted also in dismissal of the interventions because of a lack of an independent jurisdictional ground.

A separate order has been entered in accordance with this opinion.

Contemporaneously with the argument of the hereinabove discussed motions, there was submitted and argued a motion in a similar case of *Homer A. Bonhiver, etc.* v. *Exchange Nat'l Bank of Chicago*, 3-68 Civ. 95, filed March 27, 1968. American Allied, through its Receiver, commenced this latter action by personal service of the summons and complaint upon the defendant (plaintiff here) pursuant to 32 Minn. Stat. § 543.19 (Supp. 1967). The action, brought in the Ramsey County District Court of Minnesota, was duly removed by defendant to this court under 28 U.S.C. § 1441 (a). Defendant (plaintiff here) now moves the court for an order quashing service of process and dismissing the plaintiff's complaint. As grounds

therefor, defendant contends that (1) the above-mentioned "long-arm statute" cannot be "retroactively" applied under Minnesota law, and (2) irrespective of the validity of service, 12 U.S.C. § 94, the applicable venue statute for national banks, permits this suit against the Bank only in Illinois where it is established and located for venue purposes.

The complaint in this latter action is a repetition of the "draft complaint" and of the intervenor's $10,500,000.00 counterclaim discussed above. In view of the decision above holding that the Receiver will be entitled to proceed on his counterclaim, a decision of the question in this latter case is unnecessary and moot, though it would appear that the Bank's position on venue under 12 U.S.C. § 94 is better founded where a completely separate action is brought than where a counterclaim is asserted in a pending action which the Bank itself has brought in this court. In any event, preserving both actions serves no useful purpose and a separate order has been entered dismissing *Homer A. Bonhiver* v. *Exchange Nat'l Bank of Chicago,* 3-68 Civ. 95, in which order reference is made to this opinion and to the order entered in 3-68 Civ. 24 pursuant hereto.

Order Denying § 1292(b) Certification

(September 24, 1968)

(Unreported)

This matter again is before the court, this time on the motion of plaintiff requesting the court to issue a certificate pursuant to 28 U.S.C. § 1292(b) that the ruling contained in this court's interlocutory order of August 20, 1968 embodies "a controlling question of law as to which there is

substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation." The motion was heard September 10, 1968 at St. Paul, Minnesota. Best, Flanagan, Lewis, Simonet & Bellows by Harold C. Evarts, Esq., Minneapolis, Minnesota, appeared for plaintiff in support of the motion; Briggs and Morgan by David C. Forsberg, Esq., St. Paul, Minnesota, appeared for the Intervenor in opposition thereto. There were no other appearances. The court heard the arguments of counsel, and since has examined the memoranda submitted. On the basis thereof and on all of the files, records and proceedings herein,

IT IS ORDERED That plaintiff's motion be, and the same hereby is denied.

Dated: September 24, 1968.

/s/ PHILIP NEVILLE,
United States District Judge.

MEMORANDUM

In the order of August 20, 1968, this court held that under all the attendant circumstances, a counterclaim was properly asserted by the intervenor, the Receiver for American Allied Insurance Company, and that the case should stand for trial in the District of Minnesota on the intervenor's counterclaim. Originally, see *Exchange Nat'l Bank* v. *Abramson,* 278 F. Supp. 849 (D. Minn. 1968), plaintiff argued at great length that the bringing of a proposed suit against it in Chicago, Illinois would cause it irreparable harm. The intervenor obliged by filing substantially the same claim as he had indicated would be filed in Illinois

in this court by way of counterclaim. Plaintiff now contends this is improper and that the counterclaim should be stricken.

It seems clear to the court that plaintiff is bound to be sued by intervenor sooner or later in some court. The only question now involved or presented in the court's order of August 20, 1968, is one of venue. This court's decision of August 20, 1968 does not "involve a controlling question of law." In reality it merely contains a decision as to where the case should be tried i.e., Minnesota or Illinois. This situation is readily distinguishable from one where there is involved, for instance, the question of the bar of the statute of limitations, or subject matter jurisdiction of the Federal Courts, or waiver or any number of other affirmative defenses which, once decided, would control or affect the case wherever tried. Nothing in this court's August 20, 1968 decision determines the manner of trial or the legal principles that will govern and control or the admissibility of evidence nor the scope of the issues involved. All this court's decision did was to determine where, not how and under what conditions, the case will be tried.

An interim appeal certainly will delay the trial of the case the better part of a year. A companion matter, though not affecting this case since Abramson is not named as counsel in the second counterclaim here, is now on appeal and presumably will be decided prior to the time the instant case can come to trial. *Allied Realty Co.* v. *Exchange Nat'l Bank,* 283 F. Supp. 464 (D. Minn. 1968). Experience there indicates a delay of more than six months from April 15, 1968, the date of the court's challenged order, to date and counsel advises that the filing of briefs has not yet been completed. and thus the case has not yet even been set for argument before the Court of Appeals.

Counsel raises the specter of a trial in this case lasting two months or more and urges on the court that all this will be wasted judicial time and time of counsel if ultimately the Court of Appeals determines that this trial court was wrong on the question of venue. While this undoubtedly is true, this same argument can be made on almost any interlocutory or interim ruling of a trial court that ultimately may turn out to be reversible error. Carried to its absurdity, an interim appeal should lie, if plaintiff's position be sound, from every denial of a motion to dismiss, every denial of a directed verdict or motion for summary judgment and even from adverse rulings on admission of evidence on the ground that time thereafter is wasted by continuing the trial if in fact the court has erred. Piecemeal appeals are undesirable, and the court believes interlocutory appeals should be granted only in "exceptional cases". 1 Barron & Holtzoff (Wright Ed.) § 58.1, p. 322. As a practical matter, such a two month's trial as plaintiff envisions, though it would of course be a waste of judicial time if this court's August 20, 1968 order is reversed, would not be particularly wasteful as to the extensive discovery proceedings said to be necessary before trial as such should be useable in any trial; further, the record of the possible abortive trial certainly would be valuable for the other trial. The court does not base its decision of this motion on this theory, however, but on the concept that no controlling question of law is involved and that an appeal cannot materially advance the ultimate termination of the litigation. The trial undoubtedly will take just as long in Illinois as in Minnesota, the only difference being that it will be a year later there if an appeal is allowed and the order of August 20, 1968 is reversed. For all these reasons, the motion is denied.

While the various hearings before this court have not been pretrial hearings or conferences, the court has obtained a sufficient flavor of the case to realize that rather extensive discovery proceedings are contemplated. The court is aware that the events which are the basis of plaintiff's claims go back to 1961 and 1963 and that it was nearly a year ago that intervenor first presented its "draft complaint" to plaintiff. The court therefore establishes a timetable for this case as follows and IT IS SO ORDERED:

1. All motions by either party of any kind shall be presented to the court and argued within a period of two months from date, i.e., on or before November 20, 1968.

2. All discovery proceedings of whatever kind shall be undertaken promptly and completed within a period of five months from now, i.e., February 20, 1969.

3. The case will be placed on this court's trial calendar on April 20, 1969, seven months from now, to take its order for trial, and will proceed to trial as rapidly as it can be reached thereafter.

/s/ PHILIP NEVILLE,
United States District Judge.

APPENDIX D
Opinion In Companion Case

Reported at 283 F. Supp. 464 (1968)

United States District Court
District of Minnesota
Third Division

No. 3-65 Civ. 309

Allied Realty of St. Paul, Inc.,

Plaintiff,

vs.

Exchange National Bank of Chicago, Gertrude Brown, Phillip Kitzer, Sr. and Helen Kitzer, his wife, and Phillip C. Kitzer and Helen Kitzer, his wife,

Defendants.

ORDER

(April 11, 1968)

The above-entitled matter came on for hearing before the undersigned, a judge of this court, at St. Paul, Minnesota, on March 25, 1968, on the motion of the plaintiff, Allied Realty of St. Paul, Inc., for an order declaring (1) that its attorney, Sidney P. Abramson, "has been guilty of no unprofessional or unethical conduct" in representing the plaintiff; (2) that Sidney P. Abramson may act according to an order issued by a Ramsey County district court ap-

pointing him as counsel for the plaintiff; and (3) that the Receiver for the plaintiff is not in any manner prejudiced or otherwise disabled from prosecuting the above-entitled matter against the defendant herein. Defendant, Exchange National Bank of Chicago, moved the court for an order (1) declaring that Sidney P. Abramson acted and is acting in violation of Canon 36 of the Canons of Professional Ethics of the American Bar Association; (2) restraining and disqualifying Abramson, his agents, servants, employees, associates and all persons in privy with him and others from (a) acting as counsel in any action against the Exchange National Bank involving claims raised as subject matter in a prior official United States Government investigation and prosecution; (b) using information, documents or knowledge learned, examined or obtained by Abramson as an Assistant or Special Assistant United States District Attorney; and (c) filing a lawsuit styled "draft complaint" attached as Exhibit D to a complaint in *Exchange National Bank of Chicago* v. *Sidney P. Abramson,* No. 3-68 Civ. 24 (D. Minn.) involving allegations in said complaint and prepared by or with the assistance of Abramson; and (3) expunging the complaint in this action as amended November 24, 1967. Appearing for the plaintiff in support of the motion were Briggs & Morgan by David Forsberg, First National Bank Building, St. Paul, Minnesota together with Sidney P. Abramson, Esq., 1001 Degree of Honor Bldg., St. Paul, Minnesota. Appearances for the defendant were by Best, Flanagan, Lewis, Simonet & Bellows by Harold Evarts, Esq., 1200 First National Bank Bldg., Minneapolis, Minnesota; D'Ancona, Pflaum, Wyatt & Riskind by Edgar Bernhard, Esq., 33 North LaSalle Street, Chicago, Illinois; Raskin, Downing & Dammann by Merrill A. Freed, Esq.,

105 South LaSalle Street, Chicago, Illinois. The parties stipulated into the record that the evidence upon which the court may base its findings includes all of the records, files, exhibits and evidence in a certain proceeding related to the issues herein which was brought before this court in a case entitled *Exchange National Bank of Chicago* v. *Sidney P. Abramson*, No. 3-68 Civ. 24 (D. Minn.).

The court has examined the pleadings, motion papers, accompanying affidavits and testimony properly before it, and has read and examined the briefs submitted by the respective parties. On the basis thereof, and on the basis of all of the files, records and proceedings herein,

IT IS ORDERED That the motion of the plaintiff be, and the same hereby is denied as to parts (1) and (2) thereof and granted as to part (3) thereof.

IT IS FURTHER ORDERED That the motion of the defendant Bank is granted as to part (1) thereof, denied as to part (2) thereof except that the same is granted as to Sidney P. Abramson individually, and denied as to part (3) thereof.

Dated: April 11, 1968.

/s/ PHILIP NEVILLE,
United States District Judge.

Neville, District Judge.

Involved here is the applicability of Canon 36 of the American Bar Association Canons of Professional Ethics, which Canons were adopted by the Minnesota Supreme Court May 2, 1965 as standards of professional conduct. The canon provides in relevant part:

> "A lawyer, having once held public office or having been in the public employ, should not after his retirement accept employment in connection with any matter which he has investigated or passed upon while in such office or employ."

Plaintiff by motion seeks declaratory relief that a lawyer, Sidney P. Abramson, whom it has engaged as one of its counsel in this case, by so acting neither has nor is engaged in unprofessional or unethical conduct. Defendant seeks an order to the contrary, barring Abramson's serving in such capacity and requesting other relief.

A related matter has been before this court before. *Exchange Nat'l Bank* v. *Abramson,* No. 3-68 Civ. 24, — F. Supp. — (D. Minn. February 3, 1968). The question herein was not squarely met in that case, though on review the Court of Appeals rendered the matter moot by holding this court to be without jurisdiction. *Exchange Nat'l Bank* v. *Abramson,* No. 19,188, 8th Cir., February 15, 1968.

A brief history is necessary. In 1965 the Federal grand jury sitting in Minnesota returned indictments against some 14 or more individuals for alleged criminal activity growing out of the failure and ultimate insolvency of American Allied Insurance Company. Three of the former employees of defendant Bank were among those so indicted. The plaintiff in this case, Allied Realty of St. Paul, Inc., is a wholly owned subsidiary of said Allied Insurance Company. At the time of the indictments, Abramson was employed full-time as an Assistant United States Attorney for the District of Minnesota, though he had little or nothing to do at that time with the handling of the indictments. He resigned as an Assistant United States Attorney in late 1966 to enter the private practice of law. A month or so

later he was requested to return to government employ solely to become a Special Assistant United States Attorney to aid and assist in the preparation and act as "second chair" in prosecuting the criminal trials. The actual trial being removed to Bismarck, North Dakota on defendants' motion for change of venue lasted 13 weeks and is now embodied in some 17,000 pages of transcript. The trial proceeded only against those who were regarded by the government as the principal defendants, including Phillip Kitzer, Sr. and Phillip C. Kitzer, who are also defendants in this action and alleged to have been at all times here relevant the principal owners and officers of American Allied Insurance Company and the principal officers of plaintiff herein, Allied Realty. The trial resulted in jury verdicts of not guilty as to each of the defendants then on trial including the Kitzers. The indictments as to the other defendants, including the three former employees of defendant Bank, were thereupon dismissed. Abramson's service with the government ceased shortly thereafter pursuant to his own wish.

In 1965, prior to the federal indictments, a Receiver for the affairs of American Allied Insurance Company had been duly appointed by the Minnesota State District Court in Ramsey County. The present action above-entitled in fact was commenced prior to the return of the federal indictments, and is an action seeking to set aside a claimed fradulent mortgage on Minnesota real estate issued by plaintiff Allied Realty Company and running in favor of the defendant Bank. It appears that this claim of a fraudulent mortgage as to this transaction was involved and asserted at some stage in the 13 week criminal trial at Bismarck, North Dakota. It is asserted in the complaint in this case, that the Kitzers, as principal officers and directors of

plaintiff engineered the claimed fraudulent mortgage or mortgages and certain other transactions.

In connection with his activities at the criminal trial, Abramson is very frank to admit that he was intimately associated on the Government's side with the trial of the criminal case and sat through the entire trial. He became aware of, or certainly had access to, various FBI and postal inspectors' written and oral reports and had knowledge of, and available to him, the grand jury minutes and all grand jury and government exhibits. He assisted extensively in the trial preparation. Prior to the institution of the criminal action by the federal government, a number of plaintiff's records were subpoenaed and submitted to or used before the indicting grand jury. Many of the same documents, however, and perhaps others were actually used in the criminal trial. It was some several months after completion of the criminal trial that the Receiver for American Allied Insurance Company requested Abramson to associate himself as one of the counsel in this case. The Receiver did this for the reason, as set out in his petition to the District Court of Ramsey County, Minnesota, that:

> "The employment of Mr. Sidney P. Abramson as special counsel in these matters should, in the opinion of the petitioner, be generally advantageous to the receivership estate and should likewise result in substantrial over-all saving of legal time and expense to the estate by virtue of the extensive knowledge and background Mr. Abramson now has in respect to matters particularly relating to the Exchange National Bank of Chicago as a result of his participation as Special Assistant to the United States Attorney in the criminal trials recently concluded at Bismarck, North Dakota,

involving the trial of certain former officers of American Allied Insurance Company and Allied Realty of St. Paul, Inc."

The Receiver employed Abramson, pursuant to the order of the Ramsey County court as special counsel (1) to associate himself as attorney in this case and (2) to institute a new action to recover funds from this defendant for other matters and various transactions. The latter case, while still in the threatened stage and before actual service of any complaint was challenged by a separate suit brought by the defendant Bank in this court. It was in this separate suit, the object of which was to enjoin the Allied Receiver from the bringing of a threatened suit so long as Abramson represented him, that the Court of Appeals held the jurisdictional amount of $10,000 was lacking. Such a jurisdictional lack cannot, it seems to this court, be asserted or claimed in the present proceeding which is not a separate suit solely to challenge Abramson, but is a motion in a presently pending suit (which itself clearly involves more than the jurisdictional minimum) to bar Abramson's association as counsel for plaintiff.

It should be clearly noted that this is not a case wherein an attorney leaves the government employ and becomes retained by the person or company against whom the government has been proceeding. Such would be "switching of sides" in direct contravention of Canon 6 of the aforesaid Canons. No such charge is here made. The position Abramson now takes is consistent with and not adverse to the one he took while with the government.

Nor does the situation at hand involve Canon 37 which prohibits the disclosure of the client's private and confidential information, for there has been filed with this court a

full consent to Abramson's proceeding in this matter, signed by the United States District Attorney for the District of Minnesota.

In its brief, counsel for defendant says of Abramson:

> ". . . both informally in Your Honor's Chambers. and on the record at the hearing on our motion for preliminary injunction, we made clear that we are not only *not* attacking the Defendant's character or integrity but we are saying affirmatively that we are satisfied—as no doubt the Court is satisfied—that Mr. Abramson's breach of Canon 36 was inadvertent." (emphasis added)

The court quite agrees with and endorses this statement.

The question then comes down to whether an attorney who has "investigated" or "passed upon" a particular matter while in the government employ may avail himself, after his government service, of a private legal retainer which involves not just his experience, knowledge and expertise acquired while in the government employ, but involves the use of his knowledge of a particular case or proceeding. It is this latter which makes Abramson's employment particularly valuable to the Receiver in this case, and which this court feels it necessary to condemn. Many a lawyer who has served with the government has an advantage when he enters private practice because he has acquired a working knowledge of the department in which he was employed, has learned the procedures, the governing substantive and statutory law and is to a greater or lesser degree an expert in the field in which he was engaged. Certainly this is perfectly proper and ethical. Were it not so, it would be a distinct deterrant to lawyers ever to accept employ-

ment with the government. This is distinguishable, however, from a situation where, in addition, a former government lawyer is employed and is expected to bring with him and into the proceedings a personal knowledge of a particular matter—for which the government paid him while he was learning it and for which now the client who employs him theoretically will not have to pay. This, it seems, is the situation in the present case and exactly the type of involvement which Canon 36 was designed to prevent.

The distinction attempted to be made that Abramson technically did not "investigate" or "pass upon" within the meaning of Canon 36 is tenuous, when it is considered that he devoted many hours to preparation for trial and spent the 13 weeks in the court room substantially every day if not every day assisting at trial. Such activity certainly is within the pale of Canon 36.

Five pages from the lengthy criminal trial transcript were introduced and received at the hearing before this court. These pages indicate that the government in the criminal trial attempted to show, through a series of exhibits, the mortgage transaction involving the Minnesota real estate, the subject of the present case. Neither the Receiver nor Abramson argue that this mortgage is not the same mortgage as the one involved in this case nor that such evidence was not adduced in the criminal trial. Abramson in fact reviewed many documents with officers of defendant Bank in preparation for trial, including the aforesaid mortgage documents.

Abramson does not contend that he did not marshal the documents relevant to the Minnesota mortgage transaction. Indeed, his statement which is very frank that he saw every Bank document put in evidence, coupled with the transcript

showing Bank records being introduced, compels the conclusion that Abramson passed upon them with more than a mere summary perusal. Additionally, Abramson questioned Bank employees and participated in numerous pretrial procedures.

In November, 1967, after his appointment, Abramson moved the court to amend the civil complaint on the ground "that information available to plaintiff as the result of a proceeding entitled *United States* v. *Phillip Kitzer, Sr., et al.,* concluded in June of 1967, produced information thereto unknown to the plaintiff bearing upon the facts of the above-entitled matter." While it is true that the realty transaction was not one of these transactions set out in the criminal indictment, nevertheless, evidence thereof was adduced at that trial. In sum, the court holds that the mortgage transaction constituted at least a part of the subject matter of the criminal trial and that Abramson, as Special Assistant United States Attorney, "investigated" and "passed upon" such matters within the meaning of Canon 36.

Defendant Bank submits that *Hilo Metals Co.* v. *Learner Co.,* 258 F.Supp. 23 (D. Ha. 1966) dealt with an identical factual situation and should be followed here. Abramson, on the other hand, suggests that *Hilo* is distinguishable on several grounds, and in any event argues that it reaches an unwarranted result. In *Hilo,* an attorney had been employed by the Justice Department, Antitrust Division, and had actively engaged in the investigation and prosecution of criminal antitrust actions against the Learner Company. After retiring from the Justice Department, he accepted employment with Hilo Metals Co., Ltd., for the purpose of prosecuting on its behalf a private treble

damage antitrust suit against the same defendant, the Learner Company. Defendant contended that the attorney had violated Canon 36 and should be disqualified. The court so held.

Since the court has found that Abramson investigated and passed upon the subject matter of the realty transaction involved in this case, the *Hilo* decision is highly persuasive authority. Abramson attempts to distinguish the instant circumstances on several grounds. First, it is argued that defendant Bank was not a defendant in the criminal action, but simply occupied the status of a witness; Second, the Bank is quasi-public, and therefore it should not be permitted to argue that it would not have turned its records over to Abramson but for the official position he then held; Third, the Receiver now employing Abramson is also quasi-public and should not be penalized against the public interest; Fourth, Abramson was in only an insignificant role as Special Assistant and therefore could not use his authority to prepare the case to benefit a subsequent private client; and Fifth, the action herein is not a continuation of the criminal matter in any respect whatsoever, unlike the *Hilo* case. The court acknowledges that the above contentions are for the most part true, but does not believe that such constitute legally significant distinctions from *Hilo*. This view is taken because the policy behind Canon 36 and the *Hilo* case is not altered in any respect by the distinctions asserted by Abramson. That policy is best articulated in conjunction with a discussion of Canon 36 set out by Judge Kaufman in *The Former Government Attorney and the Canons of Professional Ethics*, 70 *Harv. L. Rev.* 657 (1957), which is perhaps the only comprehensive discussion of Canon 36 available in the literature.

Judge Kaufman observes that Canon 36, in conjunction with Canons 6 and 37, have two broad and basic purposes. First, they seek to protect a client's confidential communications. Second, they attempt to avoid an "appearance of evil." It is true that neither confidentiality nor conflicting interests are here involved. Canon 36 does not speak in terms of either. Both Canon 36 and the *Hilo* decision applying it are justified on the "appearance of evil" rationale if for no other reason.

When a government attorney resigns and enters private law practice if he is permitted to seek employment in a matter which he has previously handled for the government, he is in a position either to charge a client a fee because of his knowledge acquired through his former office, in which event he is then being remunerated twice in essence, or if he does not charge a fee therefor, the private litigant fortunate enough to obtain his services places the adverse party as a disadvantage both economically and strategically. Even when neither of these results transpire, there is certainly "an appearance of evil" which this court finds justifies the disqualification of such attorneys.

United States v. *Standard Oil Co.*, 136 F. Supp. 345 (S.D. N.Y. 1955) is the decision which apparently precipitated Judge Kaufman's article in the Harvard Law Review. Judge Kaufman wrote the opinion in that case, holding that the government must prove that an ex-government attorney investigated or passed upon the subject matter involved to justify disqualifying him in a subsequent civil suit. Although the case is inapposite to the instant facts, because it involved representation without the approval of the United States government, Judge Kaufman noted another possible "appearance of evil" prevalent in these cir-

cumstances. He referred to H. S. Drinker, *Legal Ethics* p. 130, where the problem is discussed of preventing "even the appearance that the government servant may take a certain stand in the hope of later being privately employed to uphold or upset what he had done." 136 F. Supp. at 359. A rule of law permitting government attorneys to seek employment after retirment dealing with identical subject matter would permit the argument that while in the public employ they investigated and prosecuted only those matters conducive to successful civil employment later. There is absolutely no evidence that Abramson in the instant matter, intended to so aid his practice in working as Special Assistant, but the "appearance of evil" so detrimental to the profession appears to be present. Again the wisdom of Canon 36 and the *Hilo* decision is shown.

As *United States* v. *Standard Oil Co., supra,* was inapplicable to the instant case, so is *United States* v. *Mahaney,* 27 F. Supp. 463 (N.D. Cal. 1939), which is another decision dealing with advocacy of conflicting interests without permission of the former government client. Only the *Hilo* decision bears directly on the facts at bar. Because of the policies behind that decision as pointed out above, the court follows that case.

The defendant Bank also points to Opinion 135 of the American Bar Association Committee on Professional Ethics and Grievances as authority for its position. In that opinion the Committee condemns a practice whereby a public prosecutor accepts employment from one of the parties to an automobile accident case after investigating the case from a criminal standpoint for the State and declining to prosecute. The rationale used by the Committee noted the coercive effect that a prosecutor may have on private indi-

viduals he interviews and may lead them to divulge information that could be used in a civil action. The opinion reads in part as follows:

> "If the lawyer making the approach does so under sanction or color of official power, he thereby more certainly disqualifies himself from later participation as counsel in any civil litigation having its basis in or connected with the occurrence previously investigated as to its potential criminal aspects.
>
> A prosecutor cannot profit by information gained in the course of performance of his duties as a public official. Public policy forbids. Aldridge vs. Capps, 56 Okla. 678, 156 P. 624."

The Bank contends that the same rationale is available in this case, though Abramson argues in effect that here the Bank is such a sophisticated witness that it was in no fashion coerced by the government. While Abramson may in fact be correct in his analysis, the court believes that on a policy basis, it cannot make a subjective determination each time a similar situation arises and that in general a prohibition should visit ex-government attorneys who have been involved with particular matters and later contemplate private civil employment in the same matters. The same finding is true with regard to numerous other minute distinctions counsel attempts to show to distinguish the instant case from *Hilo* and the policy of Canon 36. A quote from *Hilo* is appropriate:

> "The philosophy of Canon 36 was well stated by the Committee in its opinion #49. With particular reference to that portion of the canon here involved, the opinion reads:
>
> . . .

'In *Opinion 26*, we stated that the second paragraph of the canon:

> was intended to forbid a lawyer accepting private legal employment in any matter involving the same facts as were involved in any specific question which he had previously investigated while in public office or public employ.

and, in *Opinion 37*, when referring to *Opinion 26*, we stated:

> The basis of this decision was that as a public legal official he was acting for the state, and he should not later accept any private employment in the same matter (*whether for or against his former opinion or position*), on account of the manifest possibility that his action as a public legal official might be influenced (or be open to the charge that it had been influenced) by the hope of later being employed privately either to uphold or upset what he had done.' (Emphasis added.)"

Under the above interpretations of Canon 36 and the present state of the case law, Abramson must be disqualified as an attorney in this matter.

Defendant, in its counter motion, has requested an order restraining and enjoining Abramson and "his agents, servants, employees and attorneys, and all persons in active concert or participating with him" from:

(a) participating further as counsel in this case;

(b) using evidence, knowledge or information ex-

amined or obtained by Abramson in connection with this and any other litigation; and

(c) commencing any action against defendant Bank in the United States District Court in Chicago, Illinois.

As to (a) above, the court does not feel it has authority, nor is the court inclined, to enjoin or remove other attorneys for the Receiver from continuing so to serve in this or any other case.

As to (b) above, there is no showing that plaintiff intends to use anything but documents, testimony and information that have become public by virtue of inclusion in the aforesaid 13 week criminal trial at Bismarck plus any documents and information that could normally be discovered from defendant or others by discovery proceedings under Rules 26 through 37 of the Federal Rules of Civil Procedure. The court therefore does not suppress or deem "tainted" or "immunized" any of plaintiff's intended proof at the trial even though such may have been "examined or obtained" by Abramson.

Relative to (c) above, the Receiver certainly is free to commence any action it desires, and such is not being enjoined by this court. The court does not wish in any way to prohibit the Receiver from continuing this lawsuit nor endeavor to thwart his prosecution of any other lawsuit in any fashion, except for the disqualification of Abramson. Again, the court by this decision does not impugn in any way Mr. Abramson's character or integrity.

A separate order has been entered herein in accordance with the views expressed in this opinion.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 856

EXCHANGE NATIONAL BANK OF CHICAGO,
A NATIONAL BANKING ASSOCIATION,
Petitioner,

vs.

HOMER A. BONHIVER, AS RECEIVER
OF AMERICAN ALLIED INSURANCE COMPANY,
AND SIDNEY P. ABRAMSON,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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IN THE

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EXCHANGE NATIONAL BANK OF CHICAGO,
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BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Respondent, Homer A Bonhiver, as Receiver of American Allied Insurance Company, (hereinafter, "Receiver") respectfully opposes the issuance of a writ of certiorari to review the order entered in this case on October 14, 1968, by the United States Court of Appeals for the Eighth Circuit.

QUESTION PRESENTED

Whether notice of appeal filed with the clerk of the District Court more than thirty days after the entry of the order appealed from is timely.

STATEMENT OF THE CASE

Respondent Homer A. Bonhiver (hereinafter "Receiver") deems it necessary to supplement the Statement of the Case supplied by Petitioner Exchange National Bank of Chicago (hereinafter "Bank"). The Bank's Statement, and indeed its entire Petition, is based on the incorrect assumption that the Eighth Circuit dismissed the Bank's appeal from the District Court's order of August 20, 1968, on the sole ground that the order was interlocutory in nature and therefore not appealable. The Bank scarcely alludes to the presence of another ground—one which was fatal to its appeal: that is, the appeal was filed on October 2, 1968, more than 30 days from the entry of the order appealed from, and was therefore untimely. This issue was thoroughly briefed to the Eighth Circuit by both the Bank and the Receiver. It can be demonstrated that it was the sole and exclusive ground upon which the Mandate dismissing the appeal was predicated.

In order to establish the foregoing, it is necessary to bring to this Court's attention the issues raised and the arguments made by the Bank and the Receiver in connection with the motion to dismiss the Bank's appeal. We have therefore included appendices consisting of all or parts of the various motions, briefs and affidavits submitted by the parties in connection with the said motion.

After the entry of the District Court's order of August 20, 1968, the Bank, on August 27, 1968, served a motion asking the District Court to modify the order by certifying that it involved controlling questions of law as to which there were substantial grounds for difference of opinion and that an immediate appeal from the order would materially advance the ultimate termination of the litigation. (Appendix at A-5). The motion was brought pursuant to Rule 5 of the Federal Rules of Appellate Procedure and 28 U.S.C. § 1292(b), which to-

gether provide a procedure whereby one might obtain an appeal from an interlocutory order if the District Court will certify the order as indicated, and if the Circuit Court will accept jurisdiction. The motion said that the order of August 20 "is interlocutory in nature, and, as such, is not otherwise appealable except as provided in Title 28 U.S.C. Section 1292 (b). It was supported by a brief which stated that the motion was brought pursuant to Rule 5(a), Federal Rules of Appellate Procedure. (Appendix at A-8). The District Court denied the motion. (See Appendix to Bank's Petition for Certiorari at C-28 through C-32).

The Bank on October 2, 1968 filed its Notice of Appeal from the order entered August 20, 1968. Receiver promptly filed its motion with the Eighth Circuit asking for dismissal of the appeal.[1] The motion stated:

> "1. Said notice of appeal was served and filed more than 30 days from the filing of the order appealed from;
>
> "2. The order appealed from is interlocutory in nature and therefore not appealable." (See Appendix at A-9).

The motion was supported by affidavit of the Receiver's attorney and by copies of the District Court's orders and memoranda of August 20 and September 24. It was further supported by a memorandum of law which contained arguments directed to (1) the finality of the court's order of August 20,

---

[1] The Receiver in his motion asked the Court of Appeals to hear and decide the motion to dismiss forthwith, because the District Court, in its memorandum accompanying the order of September 24, 1968 denying certification, set down a time schedule for discovery and trial of the case as follows:

1. All motions to be heard by November 20, 1968;
2. All discovery to be completed by February 20, 1969;
3. The case to be placed on the court's trial calendar on April 20, 1969 and proceed to trial as rapidly as follows.

The Receiver was concerned that this schedule could not be complied with if the disposition of the motion were not expedited.

and (2) the untimeliness of the Bank's appeal (Appendix at A-10-11).

The Bank filed a memorandum of law in opposition to the Receiver's motion directed to the issues of the finality of the order of August 20, and the timeliness of the appeal. It said in its memorandum that at the time it sought certification of the order of August 20 it believed that the order was interlocutory, and that it later concluded that the order was final and appealable under the holding of *Mercantile National Bank at Dallas v. Langdeau,* 371 U.S. 555 (1963). As to the issue of timeliness of the appeal, the Bank argued that the time to appeal was extended by its motion to certify the order. For this proposition it cited Rule 4 of the Federal Rules of Appellate Procedure which provides in part that the running of the time for filing a notice of appeal is terminated by a motion under Rule 52(b) of the Federal Rules of Civil Procedure to amend or make additional findings of fact, and by a motion under Rule 59(e) to alter or amend a judgment. The Bank argued that its motion to certify the order of August 20 was under Rule 52(b) and Rule 59(e). That portion of the Bank's memo treating the issue of timeliness is set forth in the appendix herein at A-13.

The Receiver filed a reply brief and an affidavit pointing out that the Bank was aware of the case of *Mercantile National Bank at Dallas v. Langdeau,* including the holding on the issue of appealability, at least since May 13, 1968, long before it made its motion to certify. The Bank had extensively discussed *Langdeau* in a brief served on May 13, and there said that part of the opinion in *Langdeau* was devoted to the question of the appealability of orders relating to 12 U.S.C. § 94, the statute relating to venue of national banks. The Receiver further argued that the time for appeal from the order of August 20 had not been extended by the Bank's motion for

certification. The Bank's motion was not made pursuant to Rule 52(b) or Rule 59(e) of the Federal Rules of Civil Procedure, but was made pursuant to Rule 5(a) of the Rules of Appellate Procedure. The Reply memorandum and annexed affidavit are set forth in the appendix herein at A-14 through 19.

On October 14, 1968, the Eighth Circuit, without oral argument, entered its order dismissing the Bank's appeal. The court has authority to take such action under Rule 27(b) of the Rules of Appellate Procedure. The Circuit Court said in its order:

> "The Court has considered a motion filed by counsel for appellees requesting dismissal of this appeal together with supporting and opposing memorandums. Being fully advised in the premises, it is now here ordered that his appeal be, and it is hereby, dismissed.
>
> "Mandate Forthwith."

Under Rule 27(b) the Bank could have requested "reconsideration, vacation, or modification of such action," but it did not do so.

ARGUMENT

We think it clear from the foregoing that the Eighth Circuit dismissed the Bank's appeal solely because it was untimely. Whether or not *Langdeau* is determinative of the issue of finality, it at least raises a serious question about it. If finality of the order of August 20, 1968 were the only issue presented by the motion to dismiss the appeal, the Eighth Circuit would not, in all likelihood, have dismissed the appeal until oral arguments were heard and the court had given extended consideration to the issue.

On the other hand, the appeal was untimely on its face, and the Bank cited no authority to support its tenuous argument that the time was extended by the Bank's motion to certify. Nor is the argument supportable by reason or logic. The Bank's motion for certification was not made under 52(b) of the Rules of Civil Procedure because there were no findings to be amended; neither was it a motion under 59(e), because it was not a motion to alter or amend a judgment after trial. It was according to the Bank's own statement a motion under Rule 5(a) of the Rules of Appellate Procedure.

The bringing of a motion to certify an order pursuant to Rule 5(a) clearly cannot extend the time for appeal where the motion is denied. The motion is proper only where the order sought to be certified is interlocutory and not appealable. If the order is appealable, there are no grounds for the motion, it is wholly improper, and must be denied. Surely it cannot, under these circumstances, extend the time for appeal.[2]

Rule 4 of the Federal Rules of Appellate Procedure allows the District Court to extend the time for appeal upon a showing

---

[2] Rule 5(a) of the Federal Rules of Appellate Procedure provides that where an interlocutory order is amended to include a certification, permission to appeal may be sought within 10 days thereafter. This extension is clearly understandable because the order is not appealable until it is so amended.

of "excusable neglect". The Bank did not move the District Court to exercise its discretion under this rule. In any event, the Bank could not make the necessary showing. There is nothing in the record to explain why the Bank did not appeal in time. It was fully aware of the *Langdeau* case, including the holding of that case on the issue of appealability, long prior to the time it characterized the order of August 20 as interlocutory and moved the District Court to certify it.

It is respectfully submitted that no grounds exist for the issuance of a Writ of Certiorari in this matter.

J. NEIL MORTON
DAVID C. FORSBERG
DAVID J. SPENCER
Attorneys for Respondent
HOMER A. BONHIVER,
Receiver of American Allied
Insurance Company

Of Counsel
BRIGGS and MORGAN
W-2262 First National
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St. Paul, Minnesota 55101

APPENDIX

FEDERAL RULES OF APPELLATE PROCEDURE

Rule 4.

APPEAL AS OF RIGHT—WHEN TAKEN

(a) Appeals in Civil Cases. In a civil case (including a civil action which involves an admiralty or maritime claim and a proceeding in bankruptcy or a controversy arising therein) in which an appeal is permitted by law as of right from a district court to a court of appeals the notice of appeal required by Rule 3 shall be filed with the clerk of the district court within 30 days of the date of the entry of the judgment or order appealed from; but if the United States or an officer or agency thereof is a party, the notice of appeal may be filed by any party within 60 days of such entry. If a timely notice of appeal is filed by a party, any other party may file a notice of appeal within 14 days of the date on which the first notice of appeal was filed, or within the time otherwise prescribed by this subdivision, whichever period last expires.

The running of the time for filing a notice of appeal is terminated as to all parties by a timely motion filed in the district court by any party pursuant to the Federal Rules of Civil Procedure hereafter enumerated in this sentence, and the full time for appeal fixed by this subdivision commences to run and is to be computed from the entry of any of the following orders made upon a timely motion under such rules: (1) granting or denying a motion for judgment under Rule 50(b); (2) granting or denying a motion under Rule 52(b) to amend or make additional findings of fact, whether or not an alteration of the judgment would be required if the motion is granted; (3) granting or denying a motion under Rule 59 to alter or amend the judgment; (4) denying a motion for a new

trial under Rule 59. A judgment or order is entered within the meaning of this subdivision when it is entered in the civil docket.

Upon a showing of excusable neglect, the district court may extend the time for filing the notice of appeal by any party for a period not to exceed 30 days from the expiration of the time otherwise prescribed by this subdivision. Such an extension may be granted before or after the time otherwise prescribed by this subdivision has expired; but if a request for an extension is made after such time has expired, it shall be made by motion with such notice as the court shall deem appropriate.

FEDERAL RULES OF APPELLATE PROCEDURE

Rule 5.

APPEALS BY PERMISSION UNDER 28 U.S.C. § 1292(b)

(a) Petition for Permission to Appeal. An appeal from an interlocutory order containing the statement prescribed by 28 U.S.C. § 1292(b) may be sought by filing a petition for permission to appeal with the clerk of the court of appeals within 10 days after the entry of such order in the district court with proof of service on all other parties to the action in the district court. An order may be amended to include the prescribed statement at any time, and permission to appeal may be sought within 10 days after entry of the order as amended.

28 U.S.C. § 2107 (portion)

§ *2107. Time for appeal to court of appeals*

Except as otherwise provided in this section, no appeal shall bring any judgment, order or decree in an action, suit or proceeding of a civil nature before a court of appeals for review unless notice of appeal is filed, within thirty days after the entry of such judgment, order or decree.

* * * * *

The district court may extend the time for appeal not exceeding thirty days from the expiration of the original time herein prescribed, upon a showing of excusable neglect based on failure of a party to learn of the entry of the judgment, order or decree.

28 U.S.C. § 1292(b)

§ *1292. Interlocutory decisions*

* * * *

(b) When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: *Provided, however,* That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order. As amended Oct. 31, 1951.

FEDERAL RULES OF CIVIL PROCEDURE

Rule 52.

FINDINGS BY THE COURT

* * * *

(b) Amendment. Upon motion of a party made not later than 10 days after entry of judgment the court may amend its findings or make additional findings and may amend the judgment accordingly. The motion may be made with a motion for a new trial pursuant to Rule 59. When findings of fact are made in actions tried by the court without a jury, the question of the sufficiency of the evidence to support the findings may thereafter be raised whether or not the party raising the question has made in the district court an objection to such findings or has made a motion to amend them or a motion for judgment.

Rule 59.

NEW TRIALS; AMENDMENT OF JUDGMENTS

* * * *

(e) Motion to Alter or Amend a Judgment. A motion to alter or amend the judgment shall be served not later than 10 days after entry of the judgment.

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

EXCHANGE NATIONAL BANK OF CHICAGO, A NATIONAL BANKING ASSOCIATION,

Plaintiff,

vs.

SIDNEY P. ABRAMSON,

Defendant,

and

HOMER A. BONHIVER, AS RECEIVER OF AMERICAN ALLIED INSURANCE COMPANY,

Intervener.

MOTION TO MODIFY ORDER OF AUGUST 20, 1968

To the Court above named:

Plaintiff respectfully moves the Court above named to modify its Order and Memorandum of August 20, 1968, granting leave to Intervener to file *nunc pro tunc* as of January 31, 1968, his Amended Answer and Counterclaims, which contains, as new matter, a Second Counterclaim, by supplementing said Order to certify that (a) said Order involves several controlling questions of law as to which there are substantial grounds for differences of opinion, and (b) an immediate appeal from said Order may materially advance the ultimate termination of the litigation.

The grounds of said Motion are that:

1. Said Order is predicated upon the resolution of multiple, controlling questions of law as to which the Court, in its Memorandum attached to said Order and filed simultaneously therewith, has acknowledged, in regard to at least two such propositions, that there is doubt as to which of conflicting authorities and rules of law should apply.

2. Said Order, sustaining this Court's jurisdiction to hear the issues raised in said Second Counterclaim, is interlocutory in nature, and, as such, is not otherwise appealable except as provided in Title 28, U.S.C. Section 1292(b), until there has been a final determination of issues raised in said Second Counterclaim resulting in a final judgment.

3. The subject matter of the Second Counterclaim is to a great extent substantially identical with the criminal charges set forth in an Indictment returned to this Court in United States v. Phillip Kitzer, Sr., et al. (3-66 Crim. 7), and tried in the District Court in North Dakota (455 Cr. (N.D.)), beginning March 20, 1967, and terminating after three months of trial in a verdict of acquittal on June 23, 1967.

4. Before the issues tendered in said Second Counterclaim can be brought to trial, extensive and time-consuming pretrial proceedings must be undertaken by plaintiff and defendants, contemplating, among other things, the following:

(a) Depositions of witnesses to determine the admissiblity or inadmissiblity of evidence,

(b) Depositions of witnesses for discovery of evidence,

(c) Pre-trial motions touching upon supression of evidence and,

(d) Pre-trial preparation and motions to be expected from the very complexity of the issues raised in the Second Counterclaim.

5. It is reasonable to assume that trial of the cause will consume several weeks of the time of the Court, the attorneys

and the parties, and plaintiff respectfully represents that therefore disposition of an interlocutory appeal would seem to be advisable in advance of such trial and pre-trial procedures.

6. Should it be determined upon appeal following final judgment, that the Order of August 20, 1968, was erroneously entered, the foregoing pre-trial procedures, and the trial itself will have been for naught, and the ultimate termination of the litigation would be very substantially delayed.

7. An immediate appeal from said Order, for the foregoing reasons, will materially advance the ultimate termination of the litigation.

Dated: August 27, 1968.

HAROLD C. EVARTS and
EDGAR BERNHARD
Attorneys for Plaintiff

(U.S. District Court Title)

BRIEF IN SUPPORT OF MOTION TO MODIFY ORDER OF AUGUST 20, 1968

This Court granted intervenor leave to file his Amended Answer and Counterclaims, *nunc pro tunc*, as of January 31, 1968. The pleading contained a "second counterclaim," not a part of the original proposed Answer and Counterclaim appended to intervenor's motion, which alleges facts upon which intervenor seeks to recover 10.5 million dollars in damages for fraud. By the very nature of the order permitting the second counterclaim to be filed, such order is interlocutory and is not a final, appealable order.

28 U.S.C. 1292(b), in pertinent part, provides:

> "When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. . . ."

The motion at bar is both timely and proper. Rule 5(a), Federal Rules of Appellate Procedure, provides that:

> "An [interlocutory] order may be amended to include the prescribed statement at any time, and permission to appeal may be sought within ten days after entry of the order as amended."

* * * * *

Respectfully submitted,

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

EXCHANGE NATIONAL BANK OF CHICAGO,
A NATIONAL BANKING ASSOCIATION,
Plaintiff-Appellant,

vs.

SIDNEY P. ABRAMSON,
Defendant-Appellee,

and

HOMER A. BONHIVER, AS RECEIVER OF
AMERICAN ALLIED INSURANCE COMPANY,
Intervenor-Appellee.

NOTICE OF MOTION AND MOTION TO DISMISS APPEAL OF PLAINTIFF-APPELLANT

To: Exchange National Bank of Chicago, Plaintiff, and Harold C. Evarts and Edgar Bernhardt, its attorneys; and Sidney P. Abramson, Defendant, and Theodore Collins, his attorney.

PLEASE TAKE NOTICE that Homer A. Bonhiver, as Receiver of American Allied Insurance Company, Intervenor-Appellee in the above captioned matter, will bring on for hearing before the United States Court of Appeals for the Eighth Circuit at the United States Courthouse in St. Louis, Missouri, the following motion:

Intervenor-Appellee moves the above Court: (1) to dismiss Plaintiff's appeal; and (2) that this motion be heard and decided forthwith.

The grounds for said motion are:

1. Said notice of appeal was served and filed more than 30 days from the filing of the order appealed from;

2. The order appealed from is interlocutory in nature and therefore not appealable.

Said motion is made upon the attached Affidavit of David C. Forsberg and upon all the files, records and proceedings herein.

DAVID C. FORSBERG
David C. Forsberg
Attorney for Homer A. Bonhiver,
Intervenor-Appellee

(U.S. Court of Appeals Title)

MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS APPEAL

I.

The order of August 20, 1968 of the District Court for the District of Minnesota, Third Division, is interlocutory and therefore not appealable as of right. This very fact was recognized by Plaintiff-Appellant in its motion to modify the order of August 20, 1968 when it stated, "Said Order sustaining this court's jurisdiction to hear the issues raised in said Second Counterclaim, is interlocutory in nature, and, as such, is not otherwise appealable except as provided in Title 28, U.S.C.

§ 1292(b), until there has been a final determination of issues raised in said Second Counterclaim resulting in a final judgment."

Plaintiff also stated in a brief in support of its motion to modify said order of August 20, 1968, the following, "By the very nature of the order permitting the Second Counterclaim to be filed, such order is interlocutory and is not a final, appealable order."

The lower court in its order dated September 24, 1968, which denied § 1292(b) certification, also recognized that its order of August 20, 1968 was an interlocutory order.

Pursuant to 28 U.S.C. § 1291 the courts of appeals have jurisdiction only of appeals from "final decisions" of the district courts. Jurisdiction over appeals from interlocutory decisions of the district courts comes only under 28 U.S.C. § 1292, and then only when certification has been made by the lower court, which certification has been denied in this matter.

Since Plaintiff-Appellants have conceded that the order in question is interlocutory, and since the lower court itself has recognized that its order was interlocutory, there is no issue as to that fact. Thus an appeal does not lie to the Court of Appeals under § 1291 because the order appealed from is not a final decision. No other statute, rule, or procedural vehicle remains upon which this appeal can escape dismissal forthwith by this Court.

II.

Plaintiff-Appellant's appeal is further subject to immediate dismissal due to its untimeliness. Rule 4 of the Rules of Appellate Procedure provides that the notice of an appeal from a district court to a court of appeals must be filed with the clerk of the district court within 30 days of the date of entry of the order appealed from. Plaintiff-Appellant filed its notice of appeal on October 2, 1968 and the order appealed from

was filed August 20, 1968. Thus more than 30 days had elapsed when the notice of appeal was filed. Rule 4 allows extension of the 30 day time limit only for timely motions under Federal Rules of Civil Procedure 50(b), 52(b), and 59, or upon a showing of "excusable neglect." None of those grounds exist on this appeal.

III.

This motion should be entitled to hearing and determination forthwith. Rule 27(b) of the Rules of Appellate Procedure provides that motions for procedural orders may be acted upon by the Court of Appeals at any time without awaiting a response thereto. This motion by Intervenor-Appellee for dismissal of Plaintiff-Appellant's appeal provides a most appropriate occasion for invoking that rule. Due to the apparent lack of issue before the Court as to the interlocutory nature of the order appealed from, and also due to the timetable ordered in this matter by the lower court, it is submitted that any further delay should be avoided if at all possible, by immediate hearing and determination of this motion.

Respectfully submitted,
David C. Forsberg
Attorney for Homer A.
Bonhiver, Intervenor-
Appellee

(U.S. Court of Appeals Title)

MEMORANDUM OF LAW IN OPPOSITION TO MOTION OF INTERVENOR TO DISMISS APPEAL

NO. 19469

EXCHANGE NATIONAL BANK OF CHICAGO ("Bank"), Plaintiff-Appellant, files this memorandum in opposition to the motion of HOMER A. BONHIVER, as Receiver of American Allied Insurance Company ("Receiver"), Intervenor-Appellee, to dismiss the Bank's appeal from the order of August 20, 1968.

* * * *

The Bank's Appeal Is Timely

On August 27, 1968, within ten days of the entry of the order of August 20, the Bank served its motion to amend the order of August 20. The Bank's motion to amend was denied by order dated September 24, 1968 and filed September 26, 1968.

If we are correct that the August 20 order was a final decision, then the motion to amend was a motion to make additional findings under Rule 52(b) of the Federal Rules of Civil Procedure, as well as a motion to alter or amend a judgment under Rule 59(e). In either case, under Rule 4 of the Federal Rules of Appellate Procedure, the Bank's 30-day period for appeal did not begin to run until the entry of the order on September 26.

The notice of appeal herein was filed on October 2—six days after the entry of the order.

Respectfully submitted,

(U.S. Court of Appeals Title)

REPLY MEMORANDUM OF INTERVENOR
No. 19469

The Bank in its Memorandum of Law herein says that it was originally its view that the Order of the lower court filed August 20, 1968, from which it now attempts to appeal, was interlocutory and not appealable; and that it was only after the Bank had read the case of *Mercantile National Bank at Dallas v. Langdeau,* 371 U.S. 555 (1963), that it arrived at the "studied conclusion" that the August 20 Order was final and appealable. The Bank at page 8 of its Memorandum says:

> "We, too, felt initially that the order of August 20 denying the Bank's venue plea was interlocutory. However, in the light of *Langdeau,* we now recognize, as we believe this Court should conclude, that *Langdeau* is controlling and that the order of August 20 is sufficiently final as to be appealable."

This suggests that the decision in Langdeau came to the Bank's attention only after it had made its motion for certification of the Order of August 20, and had taken the position that said Order was interlocutory. However, the affidavit of David C. Forsberg hereto annexed makes it clear that the Bank was fully aware of the *Langdeau* case, including that portion of it dealing with appealability of the Order, as early as May 13, 1968, long before it made its motion to certify. The Bank's brief in the matter of *Bonhiver v. Exchange National Bank of Chicago,* served on May 13, 1968, and signed by the same counsel who represent the Bank on this appeal, goes into extensive discussion of *Langdeau* at pages 2 and 3 and includes the following language:

> "A large part of the opinion [of *Langdeau*] is devoted to the question as to whether the order was appealable or not. That question was disposed of in favor of the position of the Bank's that it was appealable under 28 U.S.C. § 1257."

If the Bank is now seeking an extension of the time for appeal, it has clearly not made a showing of excusable neglect required by the rules.

Whether or not the Order of August 20, 1968, is final and appealable, the Bank did not serve and file its Notice of Appeal within the 30-day time limitation. It contends that the time for appeal was suspended because its motion to certify the Order of August 20 was actually a motion pursuant to Rule 52(b) and Rule 59(e). It was neither one; it was a motion pursuant to Rule 5(a) of the Rules of Appellate Procedure permitting the amendment of an order to include the statement prescribed by 28 U.S.C. § 1292(b). It was not a motion under 52(b), because there were no findings to be amended; neither was it a motion under 59(e), because it was not a motion to alter or amend a judgment after a trial.

The Bank's position is absurd. It contends that the Order of August 20 was final and appealable; if this be the case, the Bank had no right to move for amendment of the Order because 28 U.S.C. § 1292(b) expressly applies only to orders "not otherwise appealable," and the motion had to be denied. The Bank now contends that the motion, which was without any basis, nevertheless suspended the time for appeal.

It appears from the foregoing that the Bank's appeal must be dismissed.

Respectfully submitted,
DAVID C. FORSBERG
David C. Forsberg
Attorney for Intervenor-
Appellee

IN THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

EXCHANGE NATIONAL BANK OF CHICAGO, A NATIONAL BANKING ASSOCIATION,

Plaintiff-Appellant

vs.

SIDNEY P. ABRAMSON,

Defendant-Appellee,

and

HOMER A. BONHIVER, AS RECEIVER OF AMERICAN ALLIED INSURANCE COMPANY,

Intervenor-Appellee.

AFFIDAVIT OF DAVID C. FORSBERG

STATE OF MINNESOTA
COUNTY OF RAMSEY

David C. Forsberg being duly sworn on oath deposes and says that he is the attorney for Homer A. Bonhiver, the intervenor in the above-captioned matter; that in a matter entitled *Bonhiver v. Exchange National Bank of Chicago* in the United States District Court, District of Minnesota, Third Division, File No. 36-68 Civil 95, Exchange National Bank of Chicago served a brief upon the plaintiff on May 13, 1968, a true and correct copy of which is hereto annexed. Further affiant saith naught.

DAVID C. FORSBERG

(Jurat)

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION
3-68 CIVIL NO. 95

HOMER A. BONHIVER, AS RECEIVER FOR AMERICAN ALLIED INSURANCE COMPANY,
Plaintiff

vs.

EXCHANGE NATIONAL BANK OF CHICAGO,
Defendant.

BRIEF IN SUPPORT OF MOTION OF EXCHANGE NATIONAL BANK OF CHICAGO TO QUASH AND DISMISS

Defendant, EXCHANGE NATIONAL BANK OF CHICAGO, offers this Brief in support of its motion for the entry of an Order quashing purported service of summons upon it and dismissing the above entitled cause.

The motion rests upon two grounds, either of which Defendant submits is sufficient to require the relief requested.

I.

As appears from Defendant's motion, Defendant was, at the time this action was commenced, and is, a national banking association organized and existing under the laws of the United States. At all times since its organization it has had its principal office and place of business, and was and is located in the City of Chicago, Illinois. It has never been established or located in the State of Minnesota.

§ 94 of Chapter 12, U.S.C., R.S. § 5198, pertaining to national banking associations, provides as follows:

> "Actions and proceedings against any association under this chapter may be had in any district or Territorial court of the United States held within the district in which such association may be established, or in any State, county, or municipal court in the county or city in which said association is located having jurisdiction in similar cases."

The United States Supreme Court has held that the foregoing provision must be given a mandatory reading; that accordingly a national bank may be sued only where the bank is located.

In *Mercantile National Bank at Dallas v. Langdeau,* 371 U.S. 555, 9 L.Ed. 2d 523 (1963), a receiver for a Texas insurance company sued two banks and a number of other parties, alleging a conspiracy to defraud the insurance company. The trial court denied the motion of the banks to dismiss because of wrong venue. The Texas Court of Civil Appeals reversed, sustaining the motion of the banks. The Supreme Court of Texas reversed, affirming the judgment of the trial court, on the ground that the statute should be read as being permissive and not mandatory. On appeal to the Supreme Court of the United States this ruling was reversed and the banks' motion to dismiss was sustained.

A Texas statute, a part of the Texas Insurance Code, specifically provided that cases of this general type could be brought in the county where the receiver had been appointed. The United States Supreme Court held that the federal statute was to be interpreted as mandatory and was, of course, to be enforced as against a state statute.

A large part of the Opinion is devoted to the question as to whether the order was appealable or not. That question was disposed of in favor of the position of the banks that it was appealable under 28 U.S.C. § 1257.

The Supreme Court discussed the history of the federal statute, its predecessors, the amendments to it, etc., and finally stated, at Page 562 of the Opinion, that it could find nothing in the statute or its history or the cases to support the receiver's contention that the statute should be read as a permissive one rather than a mandatory one.

The case cited presents a far more difficult situation for resolution by the Court than the case at bar. In the cited case the plaintiff argued that if a bank can be sued only in the District in which it was established, then the receiver would be unable to sue in one action the two national banks who were defendants, since they were located in different counties in Texas. But the Supreme Court held that this was a matter for the Congress to consider, not the Court (Page 563). The Court, after analyzing all the federal statutes having to do with suits against national banks, concluded (Page 567) that nothing warrants the conclusion that Congress sought, even by implication, to relax the venue restrictions of Section 5198. (§ 5198 is Title 12, § 94, U.S.C.)

The rule holds notwithstanding the fact that a bank may be "doing business" within the jurisdiction in which the case is filed. The Court of Appeals has thus held in *Leonardi v. Chase National Bank of New York*, 81 F. 2d 19, 2d Cir. 1936, cert. den. 298 U.S. 677.

In that case the United States District Court held that the Chase National Bank could be sued in the Eastern District of New York, where it was operating a branch bank. The Court of Appeals reversed on the ground that the Chase National Bank had its principal office in the Southern District of New York and could be sued only there.

The case at bar again is a far clearer, simpler case than the *Chase National Bank* case. Despite the fact that the Chase was actually *doing a banking business* in the Eastern District of

New York, the Court of Appeals held, nevertheless, that it could not be sued there because that was not its principal place of business. Exchange National Bank, of course, has no branch in Minnesota or anywhere else; it was organized and established in Chicago, Illinois, and its principal and only place of business is there.

(In the *Chase National Bank* case, after the Bank made its claim of lack of jurisdiction it appeared generally and tried the case on the merits. But the Court held that the Bank had not waived the objection it had previously made as to jurisdiction.)

The statutory requirement and the cases uniformly interpreting it appear to be conclusive. Exchange National Bank is not subject to suit in any other jurisdiction than that in which its principal and only place of business is located.

II.

(Discussion of unrelated issue omitted).

Respectfully submitted,

SUPREME COURT. U. S.

No. 856

JAN 24 1969

JOHN F. DAVIS, CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1968

EXCHANGE NATIONAL BANK OF CHICAGO, a national banking association

Petitioner,

vs.

HOMER A. BONHIVER, as Receiver of American Allied Insurance Company, and **SIDNEY P. ABRAMSON**

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

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1200 First National Bank Building
Minneapolis, Minnesota 55402

McCORMICK & HENDERSON, INC., CHICAGO

In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 856

EXCHANGE NATIONAL BANK OF CHICAGO, a national banking association

Petitioner,

vs.

HOMER A. BONHIVER, as Receiver of American Allied Insurance Company, and **SIDNEY P. ABRAMSON**

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

Respondent's brief in opposition to the petition for certiorari is completely silent on the question presented by the petition, i. e., whether a District Court order which overrules a plea of venue privilege by a national bank is an appealable order under *Mercantile National Bank at Dallas* v. *Langdeau*, 371 U.S. 555 (1963).

We believe that respondent's silence is an eloquent argument in support of petitioner's position that the District

Court's order was appealable, that the appeal should not have been dismissed by the Court of Appeals, and that certiorari should be granted and the cause remanded to the Court of Appeals in order that the merits of petitioner's venue plea may be adjudicated.

Respondent's brief is devoted solely to the contention that petitioner's appeal was not timely. The statement of the case in our petition (pages 4-6) contains the relevant dates, and we submit that the following summary of those dates thoroughly demolishes any suggestion that the appeal was not timely:

August 20, 1968—Order of District Court overruling venue plea of petitioner.

August 27, 1968—Motion of petitioner to amend order of August 20 to include findings under 28 U.S.C. 1292 (b).

Elapsed time—seven days from entry of the order overruling the venue plea.

September 24, 1968—Order denying petitioner's motion to amend August 20 order.

September 26, 1968—Entry of order of September 24.

October 2, 1968—Notice of appeal given by petitioner.

Elapsed time—eight days from date of order (and only six days from the date of entry of the order) denying the motion to amend.

Respondent contends that, despite petitioner's determined and diligent effort to assert its venue plea, petitioner has somehow allowed more than 30 days to run.

However, as shown by the foregoing chronology, the longest period that petitioner allowed to elapse was eight days.

Rule 4 of the Federal Rules of Appellate Procedure (referred to in our petition at page 6) provides that the time for appeal is stayed by a timely motion to alter or amend a judgment under Rule 59 (e) of the Federal Rules of Civil Procedure.

Respondent suggests that a motion to alter or amend a judgment under Rule 59 (e) applies only to "a judgment after trial." (Respondent's brief page 6.) But Rule 59 (e) does not contain the words "after trial", nor does respondent cite any authority to support his attempted amendment of the Federal Rules.

Moreover, the Federal Rules themselves contain the answer to respondent's argument. Rule 54 (a) provides as follows:

> "(a) *Definition; Form.* 'Judgment' as used in these rules includes a decree and *any order from which an appeal lies.* A judgment shall not contain a recital of pleadings, the report of a master, or the record of prior proceedings." (Emphasis added.)

It follows, therefore, that the single question presented by this petition for certiorari is, as stated in the original petition: whether an order overruling a national bank's venue privilege is appealable under *Langdeau.* If such an order is appealable, then the August 20 order (overruling petitioner's venue plea) was a judgment as defined by Rule 54 (a), petitioner's August 27 motion was a motion to alter or amend a judgment under Rule 59 (e), and petitioner's time to appeal did not begin to run until the denial of that motion by order entered September 26, 1968.

Notice of appeal having been given on October 2, 1968, the appeal was timely under Rule 4 of the Federal Rules of Appellate Procedure.

Respondent's brief, by raising the false issue of timeliness, attempts to avoid the merits of the venue question and to escape from the binding authority of this Court's opinion in *Langdeau*.

We ask that the petition for certiorari be granted.

Respectfully submitted,

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